TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 587

THE UNITED STATES OF AMERICA, PETITIONER

vs.

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 13, 1939
CERTIORARI GRANTED JANUARY 29, 1940

No. 9055

United States

Circuit Court of Appeals

For the Ninth Circuit.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,

Appellant,

vs.

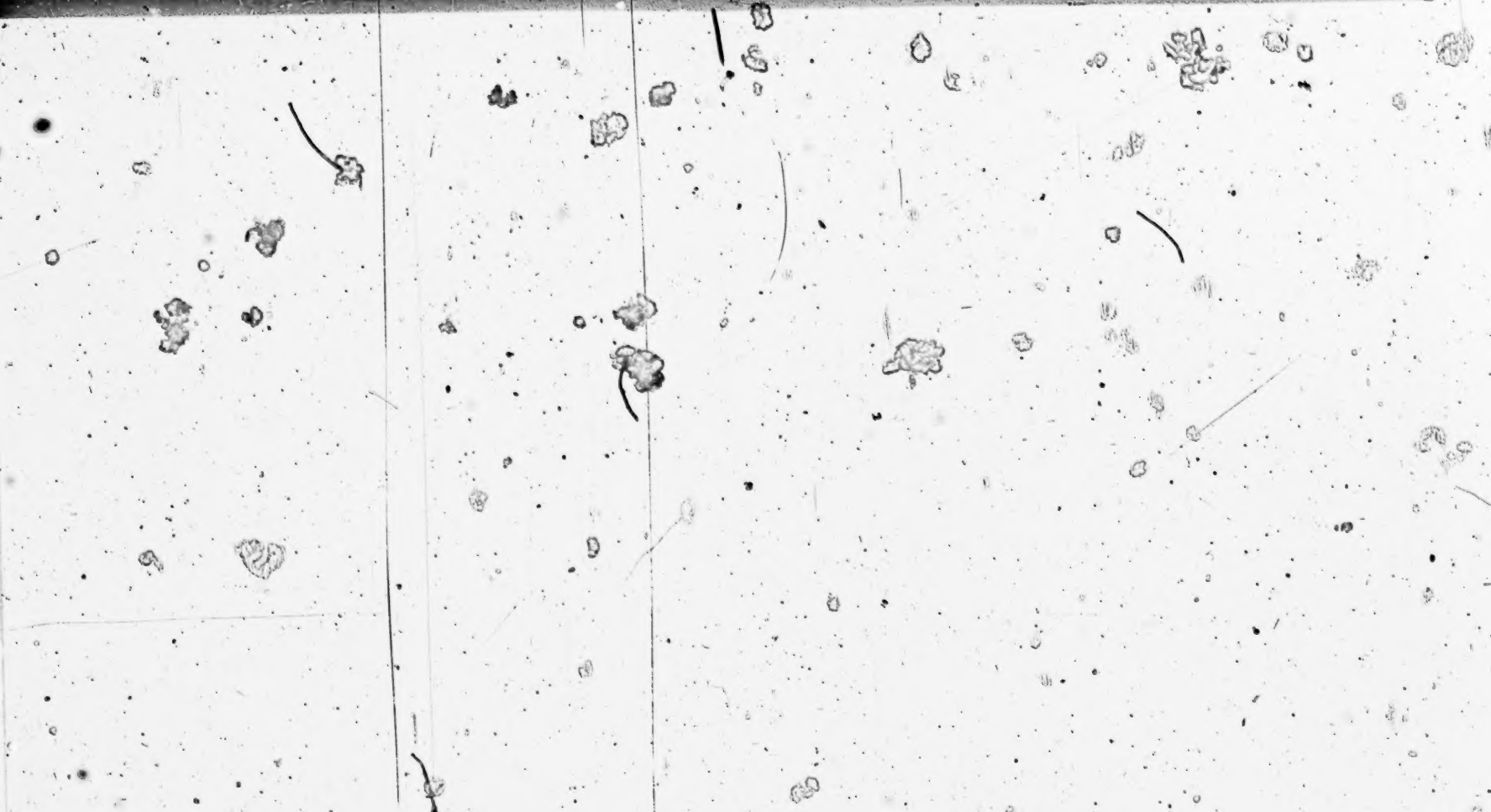
UNITED STATES OF AMERICA,

Appellee.

Transcript of the Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the Southern Division of the Northern Judicial District of California.

In Equity. No. 4173-R.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,

Defendant.

COMPLAINT FOR INJUNCTION, ACCOUNTING AND COMPENSATORY RELIEF.

To the Honorable Judge of said Court:

Comes now the United States of America, Plaintiff, by H. H. McPike, United States Attorney for the Northern District of California, its attorney, and upon application of the Secretary of the Interior of the United States and under direction and by authority of the Attorney General of the United States, complains of defendant City and County of San Francisco, a municipal corporation, and for cause of action alleges:

I.

That the United States of America, plaintiff herein, is [1*] now and at all times hereinafter mentioned was a sovereign body politic;

*Page numbering appearing at the foot of page of original certified Transcript of Record.

II.

That the City and County of San Francisco, defendant herein, is now and at all times hereinafter mentioned was a municipal corporation organized and acting as such under and by virtue of the laws of the State of California and having its principal place of business as such in the City and County of San Francisco, within the jurisdiction of this Court;

III.

That this is a suit of a civil nature in equity brought by the United States of America to restrain defendant from continuing to enjoy, use and occupy certain rights, easements and lands granted it by plaintiff in a manner and for purposes prohibited by the express terms of the statute by which such rights, easements and lands were granted and contrary to the terms and conditions of its acceptance of said grant; and to recover as damages from said defendant the reasonable value of the use and occupancy of said lands and easements for the period of time during which it has wrongfully occupied and used the same, and for an accounting from said defendant of the profits received from said wrongful enjoyment, use and occupancy;

IV.

That on or about December 19, 1913, the Congress of the United States passed an Act (the Raker Act), entitled [2]

"An Act Granting to the city and county of San Francisco certain rights of way in, over, and through certain public lands, the Yosemite National Park, and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes."

A copy of said Act is hereto attached marked Exhibit 1 and by reference herein incorporated;

That by said Act there was granted to said defendant (subject to its acceptance of the terms and conditions thereof) certain rights, easements and lands, among which was the right to use certain water supply appurtenant to plaintiff's therein described lands for the development of hydro-electric power for the use of defendant's people; such necessary rights of way in, over and through lands of plaintiff therein mentioned as in the judgment of the Secretary of the Interior were required for the purpose of constructing, maintaining and operating power and electric plants, poles and lines for generation, sale and distribution of electric energy together with such lands, in locations therein described, as might be, by the said Secretary, determined actually necessary for power houses and all other structures or buildings necessary or properly incident to the construction, operation and maintenance of said water power and electric plants;

V.

That said grant with its terms and conditions was accepted by said defendant by an ordinance passed by its Board of Supervisors January 12, 1914; approved by its Mayor January 13, 1914, and by said defendant filed with the Secretary of the Interior January 21, 1914; [3]

VI.

That the defendant pursuant to the grant of said Act constructed upon plaintiff's lands power and electric plants together with buildings, transmission lines and other structures necessary to and used in connection with the development and transmission of electric power, and is now using and occupying said lands; that said lands are those contemplated in said Act to be granted to and used by said defendant according to the terms and conditions thereof, and are part of the public lands of the United States in Tuolumne, Stanislaus, San Joaquin and Alameda Counties in the State of California, and part of the lands of the United States in Yosemite National Park and Stanislaus National Forest within said State and all of which are within the Northern District of California; a more particular description of which said lands describing the same by legal subdivisions, metes and bounds (together with a map or plat thereof) will be hereafter filed herein as amendment hereto within the pleasure of your Honorable Court;

VII.

That defendant is now, and has since about June 29, 1925, been enjoying using and occupying the rights, easements and lands granted by said Act for the purpose of generating and transmitting electric power for sale, under color of said Act; [4]

VIII.

That defendant is now and since on or about June 29, 1925 has been enjoying using and occupying the said rights, easements and lands of plaintiff in evasion of and contrary to the aforesaid terms and conditions of said Act, more particularly section 6 thereof, in this that the defendant has since said date been and now is selling the electric power generated and transmitted as aforesaid to the Pacific Gas and Electric Company, a private corporation for and with the purpose and intent that the said corporation resell the same to its customer consumers, the people of said defendant;

IX.

That from time to time since June 29, 1925, the Secretary of the Interior has represented to defendant that its sale of said electric power to said Pacific Gas & Electric Company was in evasion of and contrary to the terms and conditions of said Act and has requested that defendant cease and desist from said practice;

X.

That notwithstanding said advice and requests the defendant has continued, and threatens to, and will in the future continue under color of said Act to so sell such electric power unless restrained by order of this Honorable Court;

XI.

That pursuant to the terms of said Act more specifically Section 9(u) thereof, the Secretary of the Interior [5] did on April second 1937 advise the Honorable Homer Cummings, Attorney General of the United States, of said failure and refusal of the defendant to comply with and observe the terms and conditions of said Act and did in writing request that suit be instituted for the purpose of enforcing and carrying out the same;

XII.

That this suit is instituted on behalf of the United States of America on direction of the Attorney General of the United States pursuant to said written request and under authority of the provisions of said Section 9(u) of said Act;

XIII.

That plaintiff is informed and believes and on such information and belief alleges that the said electric power so being sold by defendant in violation of the terms and conditions of said Act is of annual value in excess of Eight Million Dollars ($8,000,000.00), and that the same is being by de-

fendant sold to said corporation for a sum not in excess of $2,200,000.00 annually.

XIV.

That prior to the enactment of said Act the remaining unappropriated water resources appurtenant to the public domain of the United States (particularly those in and appurtenant to Yosemite National Park and the Stanislaus National Forest) had been reserved and set aside to be conserved and administered by the United States for the public benefit of its people, and that the express policy of the Federal government had been, then was, and now is, to conserve [6] and administer such resources for the benefit of the public and to prevent their control by private monopoly or for private profit;

XV.

That said Act was enacted by plaintiff, and its terms and conditions were accepted by defendant, with intent and for the purpose that the United States through the Secretary of the Interior might be enabled to safeguard the public interest in the rights, easements and lands thereby granted, and to thus carry into effect the governmental policy hereinbefore set forth;

XVI.

That such of those resources as were by the said Act granted to the defendant were granted to be by it utilized and developed for the use of its people and that the said electric power so developed by it

is by the aforesaid sale being by said defendant used for the benefit of said Pacific Gas and Electric Company, a private corporation, contrary to the terms and conditions of said Act and in derogation of the governmental policy therein recognized;

XVII.

That by reason of the aforesaid wrongful enjoyment, use and occupation by defendant of plaintiff's rights and lands, defendant has thereby defrauded and damaged, and continues to defraud and damage the plaintiff; [7]

XVIII.

That under color of said Act the defendant will continue as aforesaid to wrongfully enjoy, use and occupy said rights, easements and lands, and to sell to said corporation for resale the electric power thereby and thereon generated, and will thereby continue to defraud and damage plaintiff, unless and until restrained by your Honorable Court, and that the continuance of said trespasses and operations will work great and irreparable damage to plaintiff unless restrained;

XIX.

Defendant should cease to sell said electric power as aforesaid, or at all, except in accordance with the terms and conditions of said Act; or in default thereof it should cease to enjoy, use and occupy the rights, easements, and lands granted by said Act for the purpose of the development and transmission of electric power;

Defendant should render to plaintiff a full, true and accurate accounting of all said sales by them made of electric power to said Pacific Gas and Electric Company, and should pay over to plaintiff the profits thereof. The proceeds of any such sales made during the pendency of this litigation should by order of your Honorable Court be impounded or by said defendant paid into court;

XX.

Wherefore plaintiff is without an adequate remedy at law in that there is at law no remedy as complete, practicable and efficient to the end of the prompt administration of justice as the remedies of equity hereinabove sug- [8] gested, and that the intervention of equity will prevent a multiplicity of suits;

Plaintiff therefore prays: That your Honorable Court grant a Writ of Injunction, temporary until final hearing, and perpetual thereafter, directed to the defendant, its officers, agents, servants and employees enjoining and commanding them and each of them to cease from so disposing of said electric power contrary to the provisions of said Act or that in default thereof they and each of them cease from further trespassing on said lands of plaintiff now occupied by them and cease from use and enjoyment of the rights now used and enjoyed by them under color of said Act for the purpose of development and transmission of electric power;

That your Honorable Court enter a Decree directing that defendant be required to make full, just, true and complete account for all electric power produced and sold by it under color of said Act; and that such profits be paid over to plaintiff, and that pending this litigation the proceeds of such sales hereafter made be impounded or paid into the registry of this Court;

That the rights and claims of both parties in and under said Act with special reference to the sale and resale of electric power be determined;

That the plaintiff may have its costs and disbursements herein and for such other and further relief as to your Honorable Court shall seem meet in the premises.

H. H. McPIKE
United States Attorney [9]

United States of America,
Northern District of California—ss.

Personally appeared before me, J. P. Welsh, Deputy Clerk of the District Court of the United States for the Northern District of California, H. H. McPike, United States Attorney for the Northern District of California, attorney for the United States, the plaintiff in the above cause, who, being duly sworn as to the truth of the allegations made in the above bill, says that he has read the foregoing bill and knows its contents, and so far as the matters therein stated are of his own knowledge, the same are true, and that as to all matters therein

stated the same are true to the best of his knowledge, information and belief.

H. H. McPIKE

Sworn to and subscribed before me this 27th day of April, 1937.

[Seal] J. P. WELSH

Deputy Clerk of the United States District Court for the Northern District of California.[10]

EXHIBIT I

THE RAKER ACT

December 19, 1913.
(HR 7207) (Public No. 41)

Approved December 19, 1913.
38 Statutes at Large 241.

An Act granting to the City and County of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest and the public lands in the State of California, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby granted to the City and County of San Francisco, a municipal corporation in the State of California, all necessary rights of way along such locations and of such

width, not to exceed two hundred and fifty feet, as in the judgment of the Secretary of the Interior may be required for the purposes of this Act, in, over and through the public lands of the United States in the counties of Tuolumne, Stanislaus, San Joaquin and Alameda, in the State of California, and in, over and through the Yosemite National Park and the Stanislaus National Forest, or portions thereof, lying within the said counties, for the purpose of constructing, operating and maintaining aqueducts, canals, ditches, pipes, pipe lines, flumes, tunnels and conduits for conveying water for domestic purposes and uses to the City and County of San Francisco and such other municipalities and water districts as, with the consent of the City and County of San Francisco, or in accordance with the laws of the State of California in force at the time application is made, may hereafter participate in the beneficial use of the rights and privileges granted by this Act; for the purpose of constructing, operating and maintaining power and electric plants, poles and lines for generation and sale and distribution of electric energy; also for the purpose of constructing, operating and maintaining telephone and telegraph lines, and for the purpose of constructing, operating and maintaining roads, trails, bridges, tramways, railroads and other means of locomotion, transportation and communication, such as may be necessary or proper in the construction, maintenance and operation of the works constructed by the grantee herein; together with such

lands in the Hetch Hetchy Valley and Lake Eleanor Basin within the Yosemite National Park, and the Cherry Valley within the Stanislaus National Forest, irrespective of the width or extent of said lands, as may be determined by the Secretary of the Interior to be actually necessary for surface or underground reservoirs, diverting and storage dams; together with such lands as the Secretary of the Interior may determine to be actually necessary for power houses, and all other structures or buildings necessary or properly incident to the construction, operation and maintenance of said water power and electric plants, telephone and telegraph lines, and such means of locomotion, transportation and communication as may be established; together with the right to take, free of cost, from the public lands, the Yosemite National Park and the Stanislaus National Forest adjacent to its right of way, within such distance as the Secretary of the Interior and the Secretary of Agriculture may determine, stone, earth, gravel, sand, tufa and other materials of like character actually necessary to be used in the construction, operation and repair of its said water power and electric plants, its said telephone and telegraph lines, and its said means of locomotion, transportation or communication, under such conditions and regulations as may be fixed by the Secretary of the Interior and the Secretary of Agriculture, within their respective jurisdictions, for the protection of the public lands, the Yosemite National Park and the Stanislaus National Forest:

Provided, That said grantee shall file, as hereinafter provided, a map or maps showing the boundaries, location and extent of said proposed rights of way and lands for the purposes hereinabove set forth: Provided further, That the Secretary of the Interior shall approve no location or change of location in the national forests unless said location or change of location shall have been approved in writing by the Secretary of Agriculture.

Sec. 2. That within three years after the passage of this Act said grantee shall file with the registers of the United States land offices, in the districts where said rights of way or lands are located, a map or maps showing the boundaries, locations and extent of said proposed rights of way and lands required for the purposes stated in section one of this Act; but no permanent construction work shall be commenced on said land until such map or maps shall have been filed as herein provided and approved by the Secretary of the Interior: Provided, however, That any changes of location of any of said rights of way or lands may be made by said grantee before the final completion of any of said work permitted in section one hereof, by filing such additional map or maps as may be necessary to show such changes of location, said additional map or maps to be filed in the same manner as the original map or maps; but no change of location shall become valid until approved by the Secretary of the Interior, and the approval by the Secretary of the Interior of said map or maps showing changes

of location of said rights of way or lands shall operate as an abandonment by the City and County of San Francisco to the extent of such change or changes of any of the rights of way or lands indicated on the original maps: And provided further, That any rights inuring to the grantee under this Act shall, on the approval of the map or maps referred to herein by the Secretary of the Interior, relate back to the date of the filing of said map or maps with the register of the United States Land Office as provided herein, or to the date of the filing of such maps as they may be copies of as provided for herein: And provided further, That with reference to any map or maps heretofore filed by said City and County of San Francisco or its grantor with any officer of the Department of the Interior or the Department of Agriculture, and approved by said department, the provisions hereof will be considered complied with by the filing by said grantee of copies of any of such map or maps with the register of the United States Land Office as provided for herein, which said map or maps and locations shall as in all other cases be subject to the approval of the Secretary of the Interior.

Sec. 3. That the rights of way hereby granted shall not be effective over any lands upon which homestead, mining or other existing valid claim or claims shall have been filed or made and which now in law constitute prior rights to any claim of the grantee until said grantee shall have purchased such portion or portions of such homestead, mining or

other existing valid claims as it may require for right-of-way purposes and other purposes herein set forth, and shall have procured proper relinquishments of such portion or portions of such claims, or acquired title by due process of law and just compensation paid to said entrymen or claimants, and caused proper evidence of such fact to be filed with the Commissioner of the General Land Office, and the right of such entrymen or claimants to sell and of said grantee to purchase such portion or portions of such claims are hereby granted: Provided, however, that this Act shall not apply to any lands embraced in rights of way heretofore approved under any Act of Congress for the benefit of any parties other than said grantee or its predecessors in interest.

Sec. 4. That the said grantee shall conform to all regulations adopted and prescribed by the Secretary of the Interior governing the Yosemite National Park and by the Secretary of Agriculture governing the Stanislaus National Forest, and shall not take, cut or destroy any timber within the Yosemite National Park or the Stanislaus National Forest except such as may be actually necessary in order to construct, repair and operate its said reservoirs, dams, power plants, water power and electric works, and other structures above mentioned, but no timber shall be cut or removed from lands outside of the right of way until designated by the Secretary of the Interior or the Secretary of Agriculture, respectively; and it shall pay to the United States

the full value of all timber and wood cut, injured or destroyed on or adjacent to any of the rights of way and lands, as required by the Secretary of the Interior or the Secretary of Agriculture: Provided, That no timber shall be cut by the grantee in the Yosemite National Park except from land to be submerged or which constitutes an actual obstruction to the right or rights of way or to any road or trail provided in this Act: Provided, further, That for and in consideration of the rights and privileges hereby granted to it the said grantee shall construct and maintain in good repair such bridges or other practicable crossings over its rights of way within the Stanislaus National Forest as may be prescribed in writing by the Secretary of Agriculture, and elsewhere on public lands along the line of said works, and within the Yosemite National Park as may be prescribed in writing by the Secretary of the Interior; and said grantee shall, as said water works are completed, if directed in writing by the Secretary of the Interior or the Secretary of Agriculture, construct and maintain along each side of said right of way a lawful fence of such character as may be prescribed by the proper Secretary, with such suitable lanes or crossings as the aforesaid officers shall prescribe: And provided further, That the said grantee shall clear its rights of way within the Yosemite National Park and the Stanislaus National Forest and over any public land of any debris or inflammable material as directed by the Secretary of the Interior and the Secretary of Agricul-

ture, respectively; and said grantee shall permit any road or trail which it may construct over the public lands, the Yosemite National Park or the Stanislaus National Forest to be freely used by the officials of the Government and by the public, and shall permit officials of the Government, for official business only, the free use of any telephone or telegraph lines, or equipment, or railroads that it may construct and maintain within the Yosemite National Park and the Stanislaus National Forest, or on the public lands, together with the right to connect with any such telephone or telegraph lines private telephone wires for the exclusive use of said Government officials: And provided further, That all reservoirs, dams, conduits, power plants, water power and electric works, bridges, fences and other structures not of a temporary character shall be sightly and of suitable exterior design and finish so as to harmonize with the surrounding landscape and its use as a park; and for this purpose all plans and designs shall be submitted for approval to the Secretary of the Interior.

Sec. 5. That all lands over which the rights of way mentioned in this Act shall pass shall be disposed of only subject to such easements: Provided, however, That the construction of the aforesaid works shall be prosecuted diligently, and no cessation of such construction shall continue for a period of three consecutive years, and in the event that the Secretary of the Interior shall find and deter-

mine that there has not been diligent prosecution of the work or of some integral and essential part thereof, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited all rights of the grantee herein as to that part of the works not constructed, and request the Attorney General, on behalf of the United States, to commence suit in the United States District Court for the Northern District of California for the purpose of procuring a judgment declaring all such rights to that part of the works not constructed to be forfeited to the United States, and upon such request it shall be the duty of the said Attorney General to cause to be commenced and prosecuted to a final judgment such suit: Provided further, That the Secretary of the Interior shall make no such finding and take no such action if he shall find that the construction or progress of the works has been delayed or prevented by the act of God or the public enemy, or by engineering or other difficulties that could not have been reasonably foreseen and overcome, or by other special or peculiar difficulties beyond the control of the said grantee: Provided further, That, in the exercise of the rights granted by this Act, the grantee shall at all times comply with the regulations herein authorized, and in the event of any material departure therefrom the Secretary of the Interior or the Secretary of Agriculture, respectively, may take such action as may be necessary in the courts or otherwise to enforce such regulations.

Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

Sec. 7. That for and in consideration of the grant by the United States as provided for in this Act the said grantee shall assign, free of cost to the United States, all roads and trails built under the provisions hereof; and further, after the expiration of five years from the passage of this Act the grantee shall pay to the United States the sum of $15,000 annually for a period of ten years, beginning with the expiration of the five-year period before mentioned, and for the next ten years following $20,000 annually, and for the remainder of the term of the grant shall, unless in the discretion of Congress the annual charge should be increased or diminished, pay the sum of $30,000 annually, said sums to be paid on the first day of July of each year. Until otherwise provided by Congress, said sums shall be kept in a separate fund by the United States, to be applied to the building and maintenance of roads and trails and

other improvements in the Yosemite National Park and other national parks in the State of California. The Secretary of the Interior shall designate the uses to be made of sums paid under the provisions of this section under the conditions specified herein.

Sec. 8. That the word "grantee" as used herein shall be understood as meaning the City and County of San Francisco and such other municipalities or water district or water districts as may, with the consent of the City and County of San Francisco or in accordance with the laws of the State of California, hereafter participate in or succeed to the beneficial rights and privileges granted by this Act.

Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:

(a) That upon the completion of the Hetch Hetchy Dam or the Lake Eleanor Dam, in the Yosemite National Park, by the grantee, as herein specified, and upon the commencement of the use of any reservoirs thereby created by said grantee as a source of water supply for said grantee, the following sanitary regulations shall be made effective within the watershed above and around said reservoir sites so used by said grantee:

First. No human excrement, garbage, or other refuse shall be placed in the waters of any reservoir or stream or within three hundred feet thereof.

Second. All sewage from permanent camps and hotels within the watershed shall be filtered by natural percolation through porous earth or otherwise adequately purified or destroyed.

Third. No person shall bathe, wash clothes or cooking utensils, or water stock in, or in any way pollute, the water within the limits of the Hetch Hetchy Reservoir or any reservoir constructed by the said grantee under the provisions of this grant, or in the streams leading thereto, within one mile of said reservoir; or, with reference to the Hetch Hetchy Reservoir, in the waters from the reservoir or waters entering the river between it and the "Early intake" of the aqueduct pending the completion of the aqueduct between "Early intake" and the Hetch Hetchy dam site.

Fourth. The cost of the inspection necessary to secure compliance with the sanitary regulations made a part of these conditions, which inspection shall be under the direction of the Secretary of the Interior, shall be defrayed by the said grantee.

Fifth. If at any time the sanitary regulations provided for herein shall be deemed by said grantee insufficient to protect the purity of the water supply, then the said grantee shall install a filtration plant or provide other means to guard the purity of the water. No other sanitary rules or restrictions shall be demanded by or granted to the said grantee as to the use of the watershed by campers, tourists, or the occupants of hotels and cottages.

(b) That the said grantee shall recognize the prior rights of the Modesto Irrigation District

and the Turlock Irrigation District as now constituted under the laws of the State of California, or as said districts may be hereafter enlarged to contain in the aggregate not to exceed three hundred thousand acres of land, to receive two thousand three hundred and fifty second-feet of the natural daily flow of the Tuolumne River, measured at the La Grange Dam, whenever the same can be beneficially used by said irrigation districts, and that the grantee shall never interfere with said rights.

(c) That whenever said irrigation districts receive at the La Grange Dam less than two thousand three hundred and fifty second-feet of water, and when it is necessary for their beneficial use to receive more water the said grantee shall release free of charge, out of the natural daily flow of the streams which it has intercepted, so much water as may be necessary for the beneficial use of said irrigation districts not exceeding an amount which, with the waters of the Tuolumne and its tributaries, will cause a flow at La Grange Dam of two thousand three hundred and fifty second-feet; and shall also recognize the rights of the said irrigation districts to the extent of four thousand second-feet of water out of the natural daily flow of the Tuolumne River for combined direct use and collection into storage reservoirs as may be provided by said irrigation districts, during the period of sixty days immediately following and including April fifteenth of each year, and shall during such period release free of charge such quantity of water

as may be necessary to secure to the said irrigation districts such four thousand second-feet flow or portion thereof as the said irrigation districts are capable of beneficially directly using and storing below Jawbone Creek: Provided, however, That at such times as the aggregate daily natural flow of the watershed of the Tuolumne and its tributaries measured at the La Grange Dam shall be less than said districts can beneficially use and less than two thousand three hundred and fifty second-feet, then and in that event the said grantee shall release, free of charge, the entire natural daily flow of the streams which it has under this grant intercepted.

(d) That the said grantee whenever the said irrigation districts desire water in excess of that to which they are entitled under the foregoing, shall on the written demand of the said irrigation districts sell to the said irrigation districts from the reservoir or reservoirs of the said grantee such amounts of stored water as may be needed for the beneficial use of the said irrigation districts at such a price as will return to the grantee the actual total costs of providing such stored water, such costs to be computed in accordance with the currently accepted practice of public cost accounting as may be determined by the Secretary of the Interior, including, however, a fair proportion of the cost to said grantee of the conduit, lands, dams, and water-supply system included in the Hetch Hetchy and Lake Eleanor sites; upon the express condition, however, that the said grantee may require the said

irrigation districts to purchase and pay for a minimum quantity of such stored water, and that the said grantee shall be entitled to receive compensation for a minimum quantity of stored water and shall not be required to sell and deliver to the said irrigation districts more than a maximum quantity of such stored water to be released during any calendar year: Provided, however, That if the said irrigation districts shall develop sufficient water to meet their own needs for beneficial use and shall so notify in writing the Secretary of the Interior, the said grantee shall not be required to sell or deliver to said irrigation districts the maximum or minimum amount of stored waters hereinbefore provided for, and shall release the said districts from the obligation to pay for such stored water: And provided further, That said grantee shall without cost to said irrigation districts return to the Tuolumne River above the La Grange Dam for the use of the said irrigation districts all surplus or waste water resulting from the development of hydroelectric energy generated by the said grantee.

(e) That such minimum and maximum amounts of such stored water to be so released during any calendar year as hereinbefore provided and the price to be paid therefor by the said irrigation districts are to be determined and fixed by the Secretary of the Interior in accordance with the provisions of the preceding paragraph.

(f) That the Secretary of the Interior shall revise the maximum and minimum amounts of

stored water to be supplied to said irrigation districts by said grantee as hereinbefore provided, whenever the said irrigation districts have properly developed the facilities of the Davis Reservoir of the Turlock Irrigation District and the Warner-Dallas Reservoir of the Modesto Irrigation District to the fullest practicable extent up to a development not exceeding in cost $15 per acre-foot storage capacity, and whenever additional storage has been provided by the said irrigation districts which is necessary to the economical utilization of the waters of said watershed, and also after water losses and wastes have been reduced to such reasonable minimum as will assure the economical and beneficial use of such water.

(g) That the said grantee shall not be required to furnish more than the said minimum quantity of stored water hereinbefore provided for until the said irrigation districts shall have first drawn upon their own stored water to the fullest practicable extent.

(h) That the said grantee shall not divert beyond the limits of the San Joaquin Valley any more of the waters from the Tuolumne watershed than, together with the waters which it now has or may hereafter acquire, shall be necessary for its beneficial use for domestic and other municipal purposes.

(i) That the said grantee shall, at its own expense, locate and construct, under the direction of the Secretary of the Interior, such weirs or other

suitable structures on sites to be granted, if necessary, by the United States; for accurately measuring the flow in the said river at or above La Grange Dam, and measuring the flow into and out from the reservoirs or intakes of said districts, and into and out from any reservoirs constructed by the said grantee, and at any other point on the Tuolumne River or its tributaries, which he may designate, and fit the same with water-measuring apparatus satisfactory to said Secretary and keep such hydrographic records as he may direct, such apparatus and records to be open to inspection by any interested party at any time.

(j) That by "the flow," "natural daily flow," "aggregate daily natural flow," and "what is naturally flowing," as are used herein, is meant such flow as on any given day would flow in the Tuolumne River or its tributaries if said grantee had no storage or diversion works on the said Tuolumne watershed.

(k) That when the said grantee begins the development of the Hetch Hetchy Reservoir site, it shall undertake and vigorously prosecute to completion a dam at least two hundred feet high, with a foundation capable of supporting said dam when built to its greatest economic and safe height.

(l) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for

drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated, and which may be so beneficially used by said irrigation districts or municipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein: Provided, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(m) That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy, as follows: The said

grantee shall within three years from the date of completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further, said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file such maps, surveys, field notes, or

other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(n) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale, such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interest demands or convenience requires; and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use and sale of such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower; and for that purpose the Secretary of the Interior may take possession of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed

by the grantee hereunder as may be necessary for the development, transmission, use, and sale of such power.

(o) That the rates or charges to be made by the grantee or by any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior, allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee.

(p) That this grant is upon the further condition that the grantee shall construct on the north side of the Hetch Hetchy Reservoir site a scenic road or trail, as the Secretary of the Interior may determine, above and along the proposed lake to such point as may be designated by the said Secretary, and also leading from said scenic road or trail a trail to the Tiltill Valley and to Lake Vernon, and a road or trail to Lake Eleanor and Cherry Valley via McGill Meadow; and likewise the said grantee shall build a wagon road from Hamilton or Smiths Station along the most feasible route adjacent to its

proposed aqueduct from Groveland to Portulaca or Hog Ranch and into the Hetch Hetchy Dam site, and a road along the southerly slope of Smiths Peak from Hog Ranch past Harden Lake to a junction with the old Tioga Road in section four, township one south, range twenty-one east, Mount Diablo base and meridian, and such roads and trails made necessary by this grant, and as may be prescribed by the Secretary of the Interior. Said grantee shall have the right to build and maintain such other necessary roads or trails through the public lands, for the construction and operation of its works, subject, however, to the approval of the Secretary of Agriculture in the Stanislaus National Forest, and the Secretary of the Interior in the Yosemite National Park. The said grantee shall further lay and maintain a water pipe, or otherwise provide a good and sufficient supply of water for camp purposes at the Meadow, one-third of a mile, more or less, southeasterly from the Hetch Hetchy Dam site.

That all trail and road building and maintenance by the said grantee in the Yosemite National Park and the Stanislaus National Forest shall be done subject to the direction and approval of the Secretary of the Interior or the Secretary of Agriculture according to their respective jurisdictions.

(q.) That the said grantee shall furnish water at cost to any authorized occupant within one mile of the reservoir and in addition to the sums provided for in section seven it shall reimburse the

United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed.

(r) That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations and decisions respecting the rights, benefits, or obligations specified in this Act, which investigations or decisions involve expense to the said Department of the Interior, then such expense shall be borne by said grantee.

(s) That the grantee shall file with the Secretary of the Interior, within six months after the approval of this Act, its acceptance of the terms and conditions of this grant.

(t) That the grantee herein shall convey to the United States, by proper conveyance, a good and sufficient title free from all liens and encumbrances of any nature whatever, to any and all tracts of land which are now owned by said grantee within the Yosemite National Park or that part of the national forest adjacent thereto not actually required for use under the provisions of this Act, said conveyance to be approved by and filed with the Secretary of the Interior within six months after the said grantee ceases to use such lands for the purpose of construction or repair under the provisions of this Act.

(u) That the City and County of San Francisco shall sell to the United States, for the use of the War Department, such water as the War Department may elect to take, and shall deliver the same

through its system in or near the City of San Francisco to the mains or systems of such military reservations in that vicinity as may be designated by the Secretary of War, under such rules and regulations as he may prescribe. In payment for such water and the delivery thereof the United States shall pay to the said City and County of San Francisco a rental, to be calculated at a fixed rate per one thousand gallons, said rate not to exceed the actual cost of said water to said City and County for all the water so furnished, as determined by meter measurements: And provided further, That payment of said rental shall be made by the local disbursing officer of the War Department in the usual manner: Provided, however, That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.

Sec. 10. That this grant, so far as it relates to the said irrigation districts, shall be deemed and held to constitute a binding obligation upon said grantee in favor of the said irrigation districts which said districts, or either of them, may judicially enforce in any court of competent jurisdiction.

Sec. 11. That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State.

[Endorsed]: Filed Apr. 27, 1937. [11]

[Title of District Court and Cause.]

SUBPOENA AD RESPONDENDUM.

The President of the United States of America to City and County of San Francisco, a Municipal corporation, Greeting:

You Are Hereby Commanded, that you be and appear in the Southern Division of the United States District Court for the Northern District of California, aforesaid, at the Court Room in the City of San Francisco, within twenty days after service hereof, to answer a Bill of Complaint exhibited against you in said Court by United States of America.

and to do and receive what the said Court shall have considered in that behalf.

Witness, the Honorable Michael J. Roche, Judge of said District Court, this 27th day of April, in

the year of our Lord one thousand nine hundred and thirty-seven and of our Independence the 161st.

[Seal] WALTER B. MALING,
Clerk.

By J. P. WELSH
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.

You Are Hereby Required to file your answer or other defense in the above suit on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill: otherwise the said Bill may be taken Pro Confesso.

WALTER B. MALING,
Clerk.

By J. P. WELSH,
Deputy Clerk.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California—ss:

I hereby certify and return that I served the annexed Subpoena ad respondendum on the thereinnamed City and County of San Francisco, a Municipal Corporation, by handing to and leaving a true and correct copy thereof together with a copy of

Complaint, with Warren Shannon, as President of the Board of Supervisors of the City and County of San Francisco personally at San Francisco, Calif., in said District on the 28th day of April, A. D. 1937.

Marshal's Fees

Travel	$ .20
Service	$2.00
	$2.20

GEORGE VICE
U. S. Marshal.
By M. I. LYNCH
Deputy.

[Endorsed]: Filed Apr. 27, 1937. [12]

[Title of District Court and Cause.]

AMENDMENTS TO COMPLAINT

Comes now the plaintiff by H. H. McPike, United States Attorney for the Northern District of California and, as of course, (no answer or other pleading having been filed herein by defendant) amends its Complaint on file herein as follows:

I.

By inserting therein after the word "America", line 15, page 2 thereof the words "to enjoin the violation of a condition attached to the grant of certain rights in public lands;" [13]

II.

By inserting therein after the word "consumers", line 12, page 5 thereof the word "including";

III.

By inserting therein between paragraphs IX and X at page 5 thereof the following paragraph:

"IX-A.

"That on March 6, 1935, the said Secretary afforded to the said defendant, its officials and all interested parties a hearing to determine whether the condition expressed in section six of said Raker Act was by said defendant being violated; that said defendant at said hearing introduced evidence both oral and documentary and presented oral and written argument; that after a full and detailed consideration of said evidence and argument the said Secretary on August 24, 1935, rendered his decision that the disposition of electric energy under the terms of the contract of July 1, 1925, between the defendant and the Pacific Gas and Electric Company was in violation of said condition; that after said defendant was by said Secretary notified of said decision negotiations were conducted with said defendant by said Secretary with purpose to secure compliance with said condition; that such negotiations did not result in such compliance and that said Secretary on March 11, 1937 demanded of said defendant that it within fifteen days give assurance that said violation of said condition would cease;

that on March 30, 1937, said defendant through its Board of Supervisors refused to give such assurance and indicated that it would continue to so dispose of said electric energy." [14]

IV.

By adding thereto as Exhibit A thereof certain certified copies of the official maps of those lands generally described in paragraph VI of said Complaint which said maps are for the convenience of this court separately filed herewith and entitled Exhibit A to said Complaint;

V.

By adding thereto as Exhibit C thereof the attached photostatic copies of descriptions by legal subdivisions of the lands referred to in paragraph VI of said Complaint and delineated in Exhibit A filed herewith.

Wherefore, in consideration of the premises, plaintiff prays that the foregoing amendments be considered as and made a part of its complaint as if therein originally set forth, and that plaintiff have the relief as prayed for in said Compiaint.

H. H. McPIKE.
United States Attorney
W. E. LICKING
Assistant United States Attorney

Service of the within Amendment to Complaint by copy admitted this 25th day of June, 1937.

JNO. J. O'TOOLE
Attorney for Deft.
City & Co., S. F.

[Endorsed]: Filed Jun. 25, 1937.

The 20 pages of photostats attached to the original of this document are to be sent up to the Circuit Court of Appeals under an order for their transmittal made Nov. 7, 1938. [15]

[Title of District Court and Cause.]

ANSWER

Comes now defendant above named, and by way of answer to plaintiff's amended complaint in the above entitled action, admits, denies and alleges, as follows:

I.

Answering Paragraph IV of said complaint, defendant denies that under or by virtue of the provisions of the Raker Act referred to therein, there was granted to defendant the right to use a certain, or any, water supply appurtenant to the lands referred to in said Act for the development of hydro-electric power, or for the use of defendant's people. [16] On the contrary, it alleges that under the provisions of Section 11 of said Act, it was expressly stated by Congress that said Act should not be construed as affecting or intending to affect, or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation, or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior in carrying out the provisions of said Act was expressly directed to proceed in conformity with the laws of

said State of California. In this behalf, defendant further avers that all of the water rights acquired by, vested in, or used by defendant in the operation of its Hetch Hetchy project were acquired and vested, and are being used under and in conformity with the laws of the State of California and not by virtue of any grant or provision in said Raker Act.

II.

Answering Paragraph V of plaintiff's complaint, defendant admits the enactment by its Board of Supervisors and approval by its Mayor of said municipal ordinance passed on January 12, 1914, and the filing of the same with the Secretary of the Interior. Defendant denies, however, that under the provisions of said ordinance any terms or conditions were accepted giving the Secretary of the Interior control or direction of the defendant in the utilization of its water rights in connection with the Hetch Hetchy project or in the marketing of hydroelectric power and energy generated in conjunction with said project.

III.

Answering Paragraph VI of plaintiff's complaint, defendant denies that pursuant to the grant of said Raker Act [17] or otherwise, defendant constructed upon plaintiff's lands power and electric plants, together with buildings, transmission lines or other structures necessary to or used in connection with the development and transmission

of electric power except as hereinafter specifically enumerated; denies that the Moccasin power plant, which is the principal power plant generating electric energy on such Hetch Hetchy project, is situated on plaintiff's lands at all; alleges that said power plant is situated entirely on patented lands purchased and acquired by defendant from private owners thereof. Further answering Paragraph VI of said complaint, defendant alleges that the sole and total extent to which lands of the plaintiff are utilized in conjunction with the construction of said Hetch Hetchy project and generation of electric energy, is approximately as follows:

(1) Storage Reservoir Lands: Sixteen hundred eighty (1680) acres of public lands in Hetch Hetchy Valley and in Lake Eleanor Basin are utilized at present for water storage purposes. The fair market value of said lands so utilized as of the date of acquisition by defendant of the right to use the same is not in excess of Sixteen thousand eight hundred dollars. ($16,800).

(2) Diversion Reservoir Lands: Sixteen (16) acres of plaintiff's lands in the Stanislaus National Forest were flooded by the Early Intake diversion dam, and the fair market value of said lands as of the date of defendant's acquisition of the right to flood the same was and is One hundred sixty dollars ($160).

(3) Twenty (20) miles of aqueduct tunnel right of way through lands of the plaintiff was granted to and utilized by defendant under the terms of said

Raker grant, [18] having a fair market value as of the date of acquisition of the right to use the same, of Twelve hundred ten dollars ($1210).

(4) Three and one-quarter (3½) [sic] miles of aqueduct right of way was acquired by defendant from plaintiff under the terms of said Raker Act, in the Cherry River canyon, having a fair market value of Two hundred dollars ($200).

(5) Five (5) acres of plaintiff's lands in the bottom of the Tuolumne River canyon are occupied by the Early Intake Power Plant, built to furnish electric energy for construction purposes on the Hetch Hetchy project. Said site had a fair market value of Fifty dollars ($50) as of the date of acquisition by defendant.

(6) Forty (40) miles of power line transmission right of way were acquired by defendant from plaintiff, under the terms of said Act, and as of the date of the acquisition of the same had and have a fair market value of Two thousand four hundred twenty dollars ($2420).

(7) In addition to the foregoing, approximately not to exceed fifty (50) acres of land were temporarily allotted to defendant by plaintiff for construction of camp sites, and sixty (60) miles of rights of way for wagon roads and construction railroads. The reasonable value of such privileges does not exceed the sum of Six thousand one hundred fifty dollars ($6150).

The total approximate market value of the foregoing lands and rights as of the date of acquisition

of the same, under the terms of said Raker Act, did not and does not exceed the sum of Twenty-six thousand nine hundred ninety dollars ($26,990).

IV.

Answering the allegations contained in Paragraph VII [19] of plaintiff's complaint, defendant admits that defendant has since about June 29, 1925, been enjoying, using, and occupying the rights, easements, and lands granted by said Raker Act primarily for the purpose of constructing and operating a municipal water supply, but, as an incident thereto, for the purpose of generating and transmitting hydroelectric energy available in the development of said project, and that it has sold so much of said energy as was not required for its own purposes under the terms of said Raker Act.

V.

Answering the allegations of Paragraph VIII, defendant denies all and singular the allegations therein contained.

VI.

Answering the allegations of Paragraph IX defendant denies that since June 29, 1925, or at any other time other than hereinafter alleged, the Secretary of the Interior has represented to defendant that its sale of electric power to the Pacific Gas and Electric Company was an evasion of and contrary to, or an evasion of or contrary to the terms and conditions of the Raker Act and that defendant

was requested by the Secretary of the Interior to cease and desist, or cease or desist from the sale of said power to Pacific Gas and Electric Company and alleges further that during the month of December, 1930, defendant through its officers and agents at the request of Secretary of the Interior Honorable Ray Lyman Wilbur conferred with said Secretary on the matter of the distribution of said hydroelectric power but that said Secretary made no order or request upon defendant to cease distributing the same, as it was doing. Alleges that such representation was made by the Honorable Harold L. Ickes, Secretary of the Interior, on or about the 24th day of August, 1935. [20]

VI-A.

Answering Paragraph IX-A in Amendments to Complaint filed herein, the defendant alleges that the decision of the Secretary of the Interior therein referred to is irrelevant matter included in the complaint by amendment, and furthermore alleges that the decision of the Secretary rendered as in said paragraph stated on August 24, 1935, in which he determined, as alleged in said paragraph, that the contract of July 1, 1925 between the defendant and the Pacific Gas and Electric Company was in violation of the provisions of Section 6 of the Raker Act, was by him put upon various and sundry grounds, and this defendant alleges upon information and belief that the grounds of the said decision of the said Secretary was and each of them

was invalid, and this defendant asks that the same be so adjudged by this Court. [21]

VII.

Answering the allegations of Paragraph X of said complaint, defendant admits that in the future it will continue to sell electric energy generated on the Hetch Hetchy project in conformity with the terms of said Raker Act, and avers that under said Raker Act, and particularly the provisions of Sections 9 (m), 9 (n), and 9 (o) of said Act, it is made mandatory that electricity be generated by defendant and utilized or sold. Defendant denies that any grounds exist for the issuance of a restraining order by this Honorable Court to prevent such sale.

VIII.

Defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph XI and basing its answer on that ground, denies each and every allegation thereof.

IX.

Defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph XII and basing its answer on that ground, denies each and every allegation thereof.

X.

Answering the allegations of Paragraph XIII of plaintiff's complaint, defendant denies that the electric power alleged to be sold by defendant in viola-

tion of the terms and conditions of said Act, or otherwise, is of an annual value in excess of $8,000,000, or that at any time while said power was being delivered to said Pacific Gas and Electric Company, that the annual value of the same was in excess of $2,200,000, at the terminus of defendant's transmission line at Newark, California, or that the same is being sold by defendant to the Pacific Gas and Electric Company or any other corporation for a sum not in excess of $2,200,000 annually, or at all, and alleges that said power is being distributed by said Pacific Gas and Electric Company as the agent of said defendant and that said defendant realizes approximately $2,200,000 annually from said distribution.

XI.

Answering the allegations of Paragraph XIV of plain- [22] tiff's complaint, this defendant denies that the remaining unappropriated water resources appurtenant to the public domain of the United States, or any water resources whatever situate in the Yosemite National Park or Stanislaus National Forest, have been reserved or set aside to be conserved or administered by the United States for the public benefit of its people, or that said water resources are subject to reservation, under the Constitution or laws of the United States, by said United States for any purpose whatever, and that the sole reservations made by the United States heretofore have been of certain public lands in said Yosemite National Park and Stanislaus National

forest; that said reservations extend only to said lands and not to water resources, and that the sole and exclusive power to dispose of the water resources originating on said public lands and flowing in the streams of the State of California is vested in the State of California as a sovereign state.

XII.

Answering Paragraph XV of plaintiff's complaint, this defendant admits the allegation that it was the intent and purpose of the Raker Act that the United States through the Secretary of the Interior might be enabled to safeguard public interest in the rights, easements and lands thereby granted to defendant, but denies that such safeguarding or said Act involved or contemplated carrying into effect any such governmental policy as is set forth in plaintiff's complaint.

XIII.

Answering Paragraph XVI of plaintiff's complaint, defendant admits that such rights, easements, lands, and privileges as were granted by said Raker Act to the defendant [23] were granted to it for utilization and development for the use of its people, but denies that the electric power developed by defendant is being used by defendant for the benefit of the Pacific Gas and Electric Company, a private corporation, contrary to the terms and conditions of said Act, or in derogation of the governmental policy therein recognized, or otherwise.

XIV.

Answering Paragraph XVII of plaintiff's complaint, defendant denies that plaintiff has been defrauded and damaged, or defrauded or damaged, or that defendant continues to defraud or damage plaintiff by its alleged wrongful enjoyment, use or occupation of plaintiff's rights, or any right of plaintiff whatever.

XV.

Answering Paragraph XVIII of plaintiff's complaint, defendant denies all and singular the allegations therein contained.

XVI.

Answering Paragraph XIX of plaintiff's complaint, defendant denies all and singular the allegations therein contained.

XVII.

Answering the allegations of Paragraph XX of plaintiff's complaint, defendant denies that plaintiff is without an adequate remedy at law, or that the intervention of equity is necessary in any way for the protection of plaintiff's rights. [24]

Second Defense

For a second and separate defense to plaintiff's complaint herein, defendant alleges as follows:

I.

That the plaintiff in the ownership and disposal of the public lands of the United States acts in a

purely proprietary capacity and not in a governmental capacity, and as such proprietor is subject to all the privileges, rights, and disabilities of a private owner of property except that, being also a sovereign proprietor, its lands are not subject to taxation, nor are the acts of its officers in administering said lands subject to regulation by state laws.

II.

That by reason of its geographical location and situation, the defendant in this action was confronted in the early part of this century with the necessity of providing an additional water supply for its inhabitants, its industries, its commerce, and its municipal needs; that no adequate supplies were available in the vicinity of San Francisco Bay and, acting under the advice of competent engineering experts, defendant selected a source of water supply on the head waters of the Tuolumne River and its tributaries in Tuolumne County, in the State of California. A portion of the head waters of said river flows through lands comprised within the boundaries of the Yosemite National Park, and another portion flows through lands comprised within the boundaries of the Stanislaus National Forest. A portion of the lands lying within the two principal reservoir sites selected for said project, namely, Hetch Hetchy Valley and Lake Eleanor Basin, was at that time owned and held in private ownership in fee under patent theretofore [25] issued by the United States. Another portion of

said reservoir sites consisted of public lands, title to which was still in the plaintiff. It was also necessary in order to construct defendant's proposed water supply project that access to said reservoir sites should be had by aqueducts, canals, ditches, pipe lines, flumes, tunnels, roads, trails, electric transmission lines, and telephone and telegraph lines, so that materials might be brought on to said sites and the necessary storage dams and tunnels might be constructed thereon and therein and thereafter might be operated. Defendant first appealed to the Secretary of the Interior of the United States of America for permits to utilize such lands and rights of way for such construction purposes. In response to said application, a permit was granted to defendant by the Honorable James R. Garfield, Secretary of the Interior, in 1908, but later and in the year 1911, and after defendant had expended over $600,000 in the purchase of privately owned lands in said reservoir sites and in preliminary surveys and construction work, connected with said project, the Honorable R. A. Ballinger, then Secretary of the Interior, issued an order to show cause why this permit should not be revoked as to the Hetch Hetchy Valley in the Yosemite National Park, and suggested that the matter was one on which Congress should be requested to act. Accordingly, in 1913, defendant caused a bill to be introduced in Congress, known as the Raker Bill, authorizing the grant to defendant of the lands and rights of way sought. This bill, with numerous

amendments added by Congress, became a law on December 19, 1913, and is the Act referred to in plaintiff's complaint.

III.

Due to the fact that the lands and rights of way [26] acquired by the defendant from the plaintiff and from private owners were situated at an elevation of more than 3,000 feet above sea level, it was apparent at the outset that the gravity fall in the aqueduct line extending from said lands to San Francisco could be utilized for the generation of hydroelectric energy, and Congress in framing said Raker Act expressly provided and made it mandatory that the defendant should generate the electric energy made possible by dropping defendant's water through said difference in elevation, and required that defendant should distribute, transmit, and use or offer for sale the electric energy of not less than 60,000 horsepower which could be generated in connection with said project. The rates or charges to be made by the grantee for such power were required by said Raker Act at all times to conform to the laws of the State of California and only in the absence of any such statutory provision were they to be subject to the approval of the Secretary of the Interior; that at all times since the enactment of said Raker Act the Constitution and laws of the State of California have vested their power and authority in the defendant to fix the rates and charges for such electric energy as it might generate, and have vested exclusive authority

in the Railroad Commission of said State to pass on and approve any contracts that might be made with defendant for the transmittal or distribution of said electric energy by any privately owned public utility. Said Raker Act also imposed upon said defendant numerous conditions with respect to building roads and trails and turning the same over to the plaintiff, and to pay plaintiff annual rentals for the rights conferred by said Act varying from $15,000 to $30,000 annually. Defendant was further required under the provisions of said Act to sell electric energy to irrigation districts or municipalities for municipal public uses, [27] after which the defendant was expressly authorized by the provisions of the Act to dispose of any excess electrical energy for commercial purposes.

IV.

Following the enactment of said Raker Act in 1913, this defendant proceeded to file and obtain the approval of the Secretary of the Interior of certain maps required thereunder, and did enter into possession of the lands, rights and easements thereby granted and did construct said Hetch Hetchy project. In reliance upon the validity of said grant of rights and easements the defendant expended not less than $89,600,000 in the construction of said Hetch Hetchy project, exclusive of interest during time of construction, in addition to acquiring its local water supply distribution system from the Spring Valley Water Company at an ad-

ditional cost of $40,000,000, all of which cost was paid, or the obligation to meet the same was assumed, by defendant and its taxpayers and no part of which was paid by plaintiff. The first delivery of water from said project was made to defendant in San Francisco in the year 1934. Due to the fact that the total water supply available through the full utilization of said lands, rights, and structures involved in said project is to be delivered in installments, as required by the growing population and needs of the San Francisco bay cities, designated as the grantee under said Raker Act, it is probable that more than 100 years will elapse before said water supply is fully utilized, and many millions of dollars will still have to be expended by the defendant before such full utilization can take place. The plaintiff, however, will not be deprived of the utilization of any lands or rights of way beyond those already granted to defendant when such full utilization takes place. [28]

V.

Approximately the total acreage of lands contributed by the plaintiff to the construction of said project in the form of reservoir sites was and is Two Thousand Five Hundred and Eighty, (2580) acres, having a fair market value as of the date of acquisition of One Hundred and Twenty-Nine Thousand Dollars ($129,000). The total acreage of patented lands acquired by defendant located in said reservoir sites and necessary for use in connection with said reservoirs was One Thousand Five

Hundred and Forty-Eight (1548) acres, for which defendant paid the sum of Four Hundred and Eleven Thousand Two Hundred and Thirty Dollars, ($411,230). The total mileage of tunnel aqueduct rights of way granted by plaintiff to defendant under the terms of said Act was Forty-Five miles (45), having a fair market value as of the date of said grant of not more than Two Thousand Seven Hundred and Twenty-Two Dollars ($2722.00); the total mileage of aqueduct right of way purchased by defendant for use in the construction of said project was Eighty (80) miles, which actually cost said defendant One Million One Hundred and Fourteen Thousand Eight Hundred and Ninety-Nine Dollars ($1,114,899). The total value of the roads, trails and temporary rights for construction of railroads granted by plaintiff to defendant as of the date of such grant did not exceed the sum of Three Thousand Four Hundred and Fifty Dollars, ($3,450). That all of said roads, trails and camp sites upon completion of their use were surrendered to plaintiff by defendant and are available for the use of the public, subject to the conditions provided in the Raker Act; that in addition thereto and in further compliance with the terms of said Raker Act, defendant has expended over One Million Seven Hundred and Sixty-One Thousand Dollars ($1,761,000.) in constructing roads and trails upon plaintiff's lands required by the express provisions of said Act and by the Secretary of the Interior in administration [29] thereof for the use of plaintiff

and of the public. That in compliance with the terms of Section 7 of said Raker Act, the defendant has paid to the plaintiff Three Hundred and Thirty Thousand Dollars ($330,000) prior to the commencement of this action, and plaintiff has accepted said sum as total annual rentals for the privilege granted under the terms of said Act; that the construction of said Hetch Hetchy project to the extent that it has now been completed has extended over a period of more than twenty (20) years and including the water distribution system has cost defendant and its taxpayers to date, approximately the total sum of One Hundred Sixty-Seven Million Dollars ($167,000,000).

VI.

That in or about the year 1925 defendant had completed the Hetch Hetchy storage dam, the low dam at Lake Eleanor, the Mountain Division of the tunnel aqueduct, the Priest forebay, the Moccasin Creek power plant, and a power transmission line extending from said Moccasin power plant to the vicinity of Newark in Alameda County, California. Said moccasin power plant and the forebay and penstock line appurtenant thereto, were constructed entirely on lands owned in fee simple by the defendant and purchased by defendant from private owners. It had at that time practically reached the lawful bonding capacity authorized under its Charter and the Constitution of the State of California. It was highly desirable from an economic point of view and in conformity with the require-

ments of said Raker Act that the hydroelectric energy which could be generated at asid Moccasin power plant should be utilized and sold and the revenues therefrom used by defendant in amelioration of the financial burdens incident to the construction of said project. At that time defendant did not own and has never since acquired any retail distribution system adequate for the disposal of the 80,000 horsepower of electric [30] energy which could be generated at said Moccasin power plant or any distribution system whatever. At that time, although defendant had made formal offers to the Modesto and Turlock Irrigation Districts and municipalities situated therein to sell them hydroelectric power, as provided in the terms of said Raker Act, both of said Districts, and all of said municipalities, had declined to purchase the same. At that time the defendant had decided definitely to pierce the Coast Range Mountains with a low level aqueduct tunnel and not to utilize the electric energy generated at Moccasin power plant to pump the water supply over the Coast Range, a plan which had been in serious contemplation at the time the Raker Act was passed and was not abandoned until some years later. Thus, in the year 1925 defendant found itself with facilities for the generation and transmittal to the Town of Newark in Alameda County of eighty thousand (80,000) kilowatts of hydroelectric energy and no means of transmitting, distributing or selling the same beyond that point.

VII.

In the year 1925 the Pacific Gas and Electric Company, a public utility corporation, and the Great Western Power Company, another public utility corporation, exclusively owned all of the facilities for distributing hydroelectric energy in the City and County of San Francisco, and owned transmission lines extending from Newark to San Francisco, capable of transmitting such 80,000 kilowatts of electric energy and distributing the same to said City and County of San Francisco, its inhabitants, its industries, and its commercial users. Said public utility corporations also owned electric generating stations situate within the city limits of San Francisco and propelled by steam power capable of furnishing an adequate standby service to take care of the peak loads and occasional [31] interruptions of transmission line deliveries of hydroelectric energy to said City and County and the consumers of electricity therein. Shortly after said date said Pacific Gas and Electric Company purchased the assets of said Great Western Power Company and became the sole owner of all of said transmission and distribution facilities. In 1925 the power consumption load in the City and County of San Francisco was such, and the load factor of said load was such, that at times during each year the total energy which could be generated at said Moccasin power house would have been inadequate to supply the needs of the population of the City of San Francisco, and any safe delivery of electric

energy then required and still requires that a steam standby generating plant be made available to take up immediately the generation of electric energy if accident should happen to interrupt hydroelectric transmission, otherwise said City and County and its inhabitants would be left without electric lights or power, with very serious consequences to the lives, welfare and safety of its inhabitants.

VIII.

With all of the above factors in mind affecting the situation, the responsible authorities of the defendant City and County of San Francisco opened negotiations in the year 1925 with both of said public utility corporations, with a view to arranging some method by which this hydroelectric energy could be utilized and its reasonable value obtained by said City and County of San Francisco instead of being wasted, in violation of the express terms of said Raker Act, with consequent loss to defendant. The defendant first inquired of said public utility corporations whether they or either of them [32] would be willing to sell to defendant their transmission and distribution systems on a pay-as-you-go plan which would permit defendant to amortize the cost thereof within a period permitted by its bonded debt limitations. Each of said public utility corporations informed defendant that under no circumstances would they either sell or lease their distribution systems to the defendant for operation by defendant, upon any terms or con-

ditions whatever. The defendant's responsible authorities, having in mind an agency arrangement, the form of which had been approved by the Solicitor of the Department of the Interior in the year 1917, as then applied to the Early Intake construction power plant on the Hetch-Hetchy project, inquired of said public utility corporations whether they or either of them would be willing to enter into an agency agreement whereby such corporation would transmit and distribute such energy as agent for the defendant and for its account and benefit. The said Great Western Power Company was not interested in such an agreement, but said Pacific Gas and Electric Company consented to enter into such an arrangement. Thereupon a contract was duly prepared, executed and entered into by the defendant and said Pacific Gas and Electric Company carrying such arrangement into effect. A true, full and correct copy of such agency contract is marked Exhibit "A", attached to this answer, made a part hereof, and especially referred to for all particulars thereby shown.

IX.

Upon the execution of said contract the defendant through its Mayor and other representatives, took the same to Washington, D. C. and personally presented the same to the Honorable Hubert Work, who was then Secretary of the Interior, asking his approval of the same. Said Secretary of the Interior referred the question to the Honorable John

[33] G. Sargent, who was then Attorney General of the United States, with a request for his opinion. The said Attorney General advised the Secretary of the Interior, and the Secretary of the Interior advised defendant's representatives that there were no provisions or requirements in said Raker Act for the express approval of operating contracts made by defendant and declined to express any opinion with respect to the same. Defendant then advised the Secretary through its responsible officers that they intended to put said contract in effect and did so. Since said date said contract has been successively reviewed by Honorable Ray Lyman Wilbur and the Honorable Harold L. Ickes, both of whom were Secretaries of the Interior in the succession named; but up and until the review by Secretary of the Interior Harold L. Ickes, none of said Secretaries expressed disapproval of said agency agreement, but on the other hand permitted defendant and the Pacific Gas and Electric Company to continue the same in effect and to arrange construction programs based on the assumption that said agreement would remain available as the main source of supply of electric energy to the City and County of San Francisco and its inhabitants.

X.

In and by the provisions of defendant's municipal Charter defendant is committed to the gradual acquisition and ultimate ownership of all of its public utilities, and from time to time during the years

following 1925 said defendant submitted to its electors the question of acquiring or constructing a transmission line from Newark to San Francisco, a step-down and standby plant in San Francisco, and a distribution system for the delivery of such hydroelectric energy to its inhabitants; but on each and every occasion of said submission [34] of said proposal to said electors, said electors refused and declined to approve the same or authorize such acquisition and construction or to vote bonds necessary to finance the same. Defendant therefore was left wholly without any other means of transmitting and distributing said electric energy than those afforded by the agency agreement with the Pacific Gas and Electric Company. That the cost of a system to distribute the hydroelectric power generated by defendant on the said Hetch Hetchy project will be in excess of $50,000,000. That prior to the completion of the said hydroelectric plant at Moccasin Creek the defendant, under and pursuant and by virtue of the laws of the State of California, instituted proceedings before the Railroad Commission of the State of California, for the purpose of evaluating the distribution systems of the Pacific Gas and Electric Company and the Great Western Power Company, which said companies owned the systems in the City and County of San Francisco for the distribution of electric power, said proceedings having been instituted during the month of November, 1924, and though diligently prosecuted by said defendant, were not completed until 1931,

and that the said defendant in prosecuting said proceedings expended the sum of $392,000.

XI.

Defendant avers that all and singular the provisions of said contract, Exhibit "A", constitute a reasonable compliance with the provisions of said Raker Act and in particular with the provisions of Section 6 thereof upon which plaintiff principally relies; that said contract is not a contract to sell said energy for re-sale purposes; that said contract merely employs the Pacific Gas and Electric Company to use its transmission, standby and distribution facilities for the transmission of such hydroelectric energy to the consumers thereof, [35] to collect the rates fixed by the Railroad Commission of the State of California pursuant to the laws of said State for such distribution, and to account to the defendant for the proceeds of such operation after deducting a reasonable charge for such service and the use of said corporation's facilities. That by reason of said facts, and by reason of all the facts alleged and set forth in this separate answer to plaintiff's complaint, defendant avers that plaintiff's complaint is without equity; that said facts show that defendant's operations have not been a detriment but have been of great financial benefit to the plaintiff, and that the destruction of defendant's revenues from hydroelectric energy due to any abrogation of said agency agreement would cause a great and irreparable injury to defendant and

its taxpayers and electric energy consumers, all without any benefit whatever to the plaintiff; that under such circumstances a Court of Equity should not intervene.

Third Defense

For a third, separate and further defense to plaintiff's complaint herein, defendant alleges:

I.

Defendant herein incorporates by reference all of the allegations of its second and separate defense in this answer as fully as though herein set forth in particular.

II.

Defendant alleges that the plaintiff and its officers, the Secretary of the Interior and the Attorney General of the United States, are estopped through the previous acquiescence of their predecessors in office in the acts and proceedings of defendant with respect to said electric energy disposal, and by reason of plaintiff's receipt and acceptance of all of the [36] payments and financial benefits accruing to it under the terms of said Raker Act and its operations thereunder from now complaining of and attempting to enjoin the continuance of said agency agreement in the manner and to the extent that it has heretofore been carried out; alleges that the plaintiff, as the proprietor of public lands, is bound by the same rules of estoppel, and its agents and officers are bound by the same rules of estoppel as would govern a private individual under like

circumstances; and that plaintiff, having accepted said benefit accruing to it from the construction of said project and without offering to surrender to defendant any portion thereof, is estopped and its said Secretary of the Interior and Attorney General are estopped from depriving defendant of the enjoyment of the benefits therefrom accruing to defendant as hereinbefore alleged, and the defendant furthermore alleges that the plaintiff and its officers the Secretary of the Interior, and the Attorney General, by their action and acquiescence, as in this paragraph hereinbefore alleged and in Paragraph IV of this defense, in the existence, enforcement and enjoyment by the defendant of its contract with the Pacific Gas and Electric Company, joined with it in putting a contemporaneous construction upon the said contract and the said Raker Act to the effect that the former did not violate the latter.

III.

Defendant further alleges that its policy of distributing surplus hydroelectric energy through an agency agreement with a private corporation is entirely in accord with the public policy of the plaintiff as expressed in its distribution of hydroelectric energy generated at plaintiff's plant in Yosemite Valley, in connection with the Boulder Dam project in Southern Nevada, and in conjunction with all or practically all other [37] reclamation and water storage projects which have been undertaken by the plaintiff in recent years; that by reason of these facts the defendant had a right to rely upon an in-

terpretation of said Raker Act entirely in conformity with the accepted public practice of the plaintiff, and plaintiff is estopped in this instance from any right to complain of or enjoin defendant from placing such interpretation upon its obligations with respect to the Hetch Hetchy project.

IV.

That ever since defendant's power plant at Moccasin Creek was completed and placed in operation defendant has been using all of its appropriated waters in the Tuolumne River and its tributaries for the purpose of generating hydroelectric power at said plant, and that when said water is so used, all of it, with the exception of the amount which defendant brings to the City and County of San Francisco for domestic and commercial uses of its inhabitants and inhabitants of contiguous territory, is permitted to flow into the Dom Pedro Reservoir owned by the Turlock Irrigation District and the Modesto Irrigation District, and that said districts use said water for the production of hydroelectric power and do now sell the same and ever since the completion of said Moccasin Power Plant have sold the same to various individuals and corporations for re-sale, and although these facts were well known to plaintiff, that plaintiff has not protested against the sale of said power by said irrigation districts or taken any action to prevent the same, and the effort and endeavor of plaintiff to prevent defendant from using the same water in the same way is an unfair

and unjust discrimination against defendant, and the defendant furthermore alleges that the plaintiff and its officers, the Secretary of the Interior, and the Attorney General, by their action and acquiescence, as in this [38] paragraph hereinbefore alleged and in Paragraph II of this defense, in the existence, enforcement and enjoyment by the defendant of its contract with the Pacific Gas and Electric Company, joined with it in putting a contemporaneous construction upon the said contract and the said Raker Act to the effect that the former did not violate the latter.

Fourth Defense.

For a fourth, separate and further defense to plaintiff's complaint herein, defendant alleges:

I.

Defendant herein incorporates by reference all of the allegations of its first, second and third defenses in this answer as fully as though herein set forth in particular.

II.

That by reason of the fact that all and singular the waters used by defendant in the generation of electric power of the Hetch Hetchy project were acquired by defendant and are owned by defendant under and pursuant to the laws of the State of California, the Congress of the United States had not the power or authority to limit the use of said waters by said defendant or to impose on said de-

fendant any condition under which said waters might be used. [39]

Fifth Defense

For a fifth, separate and further defense to plaintiff's complaint herein, defendant alleges that:

I.

Defendant herein incorporates by reference all of the allegations of its first, second, third and fourth defenses in this Answer as fully as though herein set forth in particular.

II.

A controversy has arisen and exists between the plaintiff and the defendant in respect of matters shown to be in issue by the pleadings and otherwise not so appearing; and to the end that all of the questions in dispute may be set at rest in this action, the defendant alleges that it is proper to and asks that it may be adjudged (a) that the plaintiff has not and has not had since they were first appropriated by the defendant, any proprietary right, title or interest in or to any of the waters referred to in the complaint or in this action, and has no right, title or interest in or claim upon or in respect of the moneys realized by the defendant from or through said waters; (b) that the plaintiff has no proprietary right, title or interest in or to the electric energy generated by the defendant by or through the use of the water aforesaid, and has no right, title or interest in or claim upon or in re-

spect of the moneys realized by the defendant from or through said electric energy generated by the defendant; (c) that under the Raker Act the plaintiff has no right of forfeiture in respect of any of the water appropriated and diverted by the defendant or energy generated by it, and no right of accounting in respect thereto, but that it is limited for remedies of any breach of obligation imposed upon the defendant by Congress and accepted by it, as provided in the Raker Act, particularly Section 9, subsection (u) reading as follows: [40]

"Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:

(u) "* * * That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act."

(d) That the divers and sundry questions other than the foregoing which appear by the pleadings or shall later appear in the proofs be determined in accordance with right and justice.

III.

In support of the proposition that Section 9, subsection u of the Raker Act limits the remedies of the plaintiff as in said section and subsection defined, defendant alleges that the following is the history of said Section 9, subsection u: [41]

The Raker Act (38 Stat. at L. pp. 242-251) is officially entitled:

> "Chap. 4—An Act Granting to the city and county of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park, and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes." (63rd Congress, 2d Session)

The Raker Act was passed by the House September 3, 1913 (63rd Congress, 1st session); by the Senate December 3, 1913 (63rd Congress, 2d session); and became a law by approval of the President, December 19, 1913.

The language of Section 9, subdivision (u) of the act dealing with remedies for a breach of the provisions of the act by the city and county of San Francisco is as follows:

> "Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:
>
> . . . . . .

(u) . . . That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act."

The language quoted in subdivision (u) of Section 9 was added to the bill in Committee of the Whole of the House on September 2, 1913.

The language is plain and unambiguous and it was meant to express the exact idea contained in it as clearly appears by the following history of the legislative proceeding in which it originated. [42]

On Tuesday, September 2, 1913, the House of Representatives resolved itself into a Committee of the Whole for consideration of the Raker bill. The proceedings before the Committee appear in Volume 50 of the Congressional Record commencing on page 4090, foot column 2, and ending on page 4112, middle c. 2.

At page 4101, foot c. 2, the clerk read section 9 of the bill quoted from above, whereupon the following occurred.

Mr. Murray of Oklahoma moved to add to the end of the first paragraph of section 9 above quoted,

just after the word "enumerated" the following new matter:

> "And upon the violation of the grantee of any of said conditions, all the title, easements, and franchises, together with all appurtenances thereunto belonging granted by this act, shall revert to the United States." (p. 4103, top c. 2)

Mr. Mann:

> "To say that San Francisco, after it has expended $75,000,000. or $100,000,000. forfeits its entire right . . . seems to me to be going the limit. If it is the intention for Congress to reserve complete control over this and not give an absolute fixed right upon which the city may borrow money, the best way to do it, it seems to me, would be to insert the ordinary provision that Congress reserves the right to alter, amend, or repeal. Then if they violated the provisions of the act so that there is substantial violation, it is within the control of Congress." (p. 4103, middle c. 2.)

Mr. Kent (of California):

> "Mr. Chairman, it seems to me that this amendment, which means well, is altogether too severe. . . . I think that all public rights are properly safeguarded in the bill as it now stands." (p. 4103, bottom c. 2.)

After considerable discussion Mr. Murray's amendment which provided for a forfeiture was rejected by an overwhelming vote.

The following then occurred:

Mr. Ferris:

"Mr. Chairman, I think there is scarcely any difference in the views of the members of the [43] committee about the amendment offered by my colleague from Oklahoma (Mr. Murray). Some of us thought his amendment was too drastic, some thought there should be no amendment at all. I think the gentleman from California (Mr. Raker) has an amendment which will accomplish all that the gentleman from Oklahoma seeks to accomplish, and will at the same time not render the bill nugatory in any way." (p. 4105, foot c. 2)

Mr. Raker then offered an amendment, later adopted, whereby the above quoted matter of Section 9 was incorporated in the bill. (p. 4106, top c. 1).

Immediately the following occurred:

Mr. Murray (of Oklahoma):

"Mr. Chairman, that amendment is satisfactory to me." (p. 4106, top c. 1)

Mr. Raker:

"The provision just offered . . . makes it the duty of the Attorney General of the United States, upon written request of the Secretary of the Interior, to commence suit in the proper court to enforce all of these conditions and contracts between the city and county of San

Francisco and the United States, so there can be no question but that every provision not attempted to be complied with can be enforced by the United States against the city and county of San Francisco." (p. 4106, middle c. 1)

Mr. Steenerson (of Minnesota):

"Mr. Chairman, . . . If this amendment were not inserted and there were a breach in the conditions of the grant, by force of the common-law procedure and practice the Attorney General could bring a suit for forfeiture for violation of those conditions. But this amendment limits the right of the Attorney General to bring a suit not of forfeiture . . . but a suit to enforce the provisions of the grant." (p. 4106, foot c. 1)

Mr. Raker's amendment was then agreed to (p. 4106, top c. 2). Later on the same day the Committee reported the bill to the House, where the amendment was agreed to. The act was passed by the House on the next day, September 3, 1913. [44]

Wherefore, defendant prays that plaintiff take nothing by its action; that the Court hold and adjudge that said agency agreement, Exhibit "A", is a valid, existing contract between the defendant and the Pacific Gas and Electric Company and not in violation of any of the terms and provisions of said

Raker Act, and that defendant be hence dismissed with judgment for costs of suit.

JNO. J. O'TOOLE
City Attorney
DION R. HOLM
Assistant City Attorney
Attorneys for defendant, City and County of San Francisco.

[45]

State of California,
City and County of San Francisco—ss.

John J. O'Toole, being first duly sworn, deposes and says: That he is the duly elected, qualified and acting City Attorney of the City and County of San Francisco; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

JNO. J. O'TOOLE.

Subscribed and sworn to before me this 19th day of July, 1937.

EUGENE F. LACY
Deputy County Clerk and ex-officio
Deputy Clerk of the Superior Court. [46]

EXHIBIT "A"

This Agreement, made and entered into this..... day of....., 1925, by and between the Board

of Public Works of the City and County of San Francisco, acting for and on behalf of the City and County of San Francisco, a municipal corporation, hereinafter referred to as "City", under authority of the Board of Supervisors granted by Ordinance No..... (New Series), the party of the first part, and Pacific Gas and Electric Company, a corporation, of San Francisco, California, hereinafter referred to as "Company," the party of the second part;

Witnesseth:

Whereas, the City has now completed the construction of the Moccasin power plant as a part of the development of the Hetch Hetchy project, which plant has a rated capacity of 70,000 kilowatts and is capable of producing approximately 460,000,000 kilowatt hours of electric energy annually, and has also completed the building of a transmission line to the vicinity of Newark in Alameda County of sufficient capacity to transmit and deliver to that point approximately 420,000,000 kilowatt hours after allowance for transmission losses; and,

Whereas, The City has not yet constructed or acquired a transmission line from the point near Newark to the City limits, and has not yet constructed or acquired a distribution system for utilizing the power produced at Moccasin plant and delivering the same for general municipal uses and for sale to consumers of electric energy within the limits of the City and County; and,

Whereas, Pursuant to resolutions of its Board of Supervisors looking to the acquisition of a municipally owned, elec- [47] tric distribution system, the City has commenced and there is now pending before the Railroad Commission of the State of California, proceedings for the determination by the Commission of the compensation to be paid by the City for the local distribution systems and certain steam plants now owned and operated by the Pacific Gas and Electric Company and the Great Western Power Company of California, respectively, when the same shall be taken over by the City under eminent domain proceedings, or otherwise;

Whereas, The City has not funds available at the present time with which to purchase or construct a distribution system of its own and it will be necessary to submit a proposition to the People to vote bonds to provide money for that purpose before a distribution system can be purchased or constructed, and the City cannot well determine whether to purchase one or both of the local distribution systems, or to construct a distribution system of its own until the Railroad Commission determines the amount of compensation to be paid by the City for the taking of either or both of said local distribution systems under the proceedings now pending before the Commission; and

Whereas, The City intends to complete its power transmission line from Newark to San Francisco

and to acquire or construct a distribution system of its own; and

Whereas, The said Moccasin Power Plant is now in condition to operate at its full capacity of 70,000 kilowatts and unless some temporary arrangement is made between the City and the Company for the distribution to consumers of the electric energy which can be produced at said plant during the period that must elapse before the City can acquire, own and operate a distribution system of its own, there will be a great waste of said potential energy and a great loss of potential revenue to the City and its taxpayers; and, [48]

Whereas, The statistical and financial records kept by the City or the Company show the following, viz.:

1. That the total capacity and possible annual output of energy from the Moccasin plant will not be sufficient to supply all municipal requirements and the demand of consumers in the City and County for electric power and energy, although in hours and days of low energy requirement the capacity and output may be more than sufficient to supply said requirements and demands during said hours and days.

2. That the average transmission and distribution losses of energy from the Newark substation of the Company to the various consumers' motors in San Francisco is 24 per cent of all energy delivered into the system of the Company at Newark for

transmission and distribution to consumers in San Francisco.

3. That 2.383 cents is the average revenue per kilowatt hour received from all classes of consumers of the Company in San Francisco under existing rates based on the experience of the Company for the year 1924.

Now, Therefore, in consideration of the premises and the mutual covenants and conditions herein contained, the parties hereto mutually covenant and agree as follows:

First: The City hereby employs the Company and the Company accepts employment as temporary distributor for and on behalf of the City, of the electric energy to be generated at Moccasin Power House and transmitted to Newark by the City over its own transmission lines. The City agrees to so maintain its Moccasin plant that it will, whenever necessary to do so, carry load up to its full capacity of 70,000 kilowatts, subject to limitations of its forebay storage and to accidents and unforeseen contingencies; and to deliver and consign the entire energy output of its said plant to the Company, save and except such [49] portion thereof as may be reserved for City requirements as hereinafter provided. The Company agrees to accept such consignment of the entire energy output of Moccasin plant, less transmission losses and except such portion as the City shall retain as above and hereinafter mentioned, delivered at not to exceed a 75 per cent monthly load factor, to make at its own ex-

pense the necessary physical connection of the City's transmission lines with its own system at Newark; to install all necessary equipment, facilities and proper motors for accurately measuring the amount of energy delivered; to transmit so much of said energy through its own system to San Francisco as may be required to light public streets and to meet other municipal needs for electric energy; to supply street railroads and other consumers of such energy in the City; to transform, convert, regulate, distribute and meter the energy sold; to furnish all necessary peak load and steam standby service and collect from consumers of such energy the charges therefor which shall not exceed the lawfully established rates, and make accounting to the City as hereinafter in Paragraph Fifth provided.

Second: The City agrees that the energy consigned to the company from the Moccasin Plant shall be the entire output thereof, diminished only by transmission and other losses and by such amounts as the City shall require for its own use in the construction or operation of any portion of the Hetch Hetchy Project, and also by such amounts, if any, as the City may be legally required to furnish to irrigation districts or municipalities under the term of the act of Congress, approved December 19, 1913, known as the Raker Act. Failure or inability of the Company to take at Newark a part of the energy which the City is in a position to deliver to it under the terms of this agreement

shall not constitute grounds for deduction in the [50] amount of the revenue to be paid to the City had such energy been received by the Company and sold to consumers, it being understood, however, that the Company is not required to accept the output of the Moccasin plant at a monthly load factor in excess of 75 per cent.

Third: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that of the energy consigned and delivered to the Company at Newark and by the Company delivered to consumers in the City and County of San Francisco there would be transmission, substation and distribution losses amounting to 24 per cent of the energy thus consigned and delivered at Newark and therefore 76 per cent of the energy consigned and delivered at Newark should be taken as the true measure of the amount possible of deliverance to consumers.

Fourth: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that in-

asmuch as in the year 1924 under existing rates the average revenue received by the Company from consumers in San Francisco amounted to 2.383 cents per kilowatt hour, such average revenue should be applied to 76 per cent of the energy to be consigned and delivered by the City to the Company at Newark for the purposes in this contract declared.

Fifth: In order to arrive at the amount which should [51] be realized by it for its Moccasin energy consigned and delivered by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that the City shall receive for the energy consigned and delivered by it to the Company at Newark 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered at Newark, and that the Company shall receive 73.065 per cent thereof.

It is agreed by the City and the Company that the Company shall account for and pay over to the City for the energy so consigned and delivered to it by the City at Newark for transmission and distribution to consumers as provided in this contract 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered by the City to it at Newark, and the Company shall retain the aforementioned 73.065 per cent as its compensation for services rendered under this contract.

Sixth: The City shall not be obliged to deliver energy into the system of the Company at Newark,

nor shall the Company be obligated to receive such energy at such time as either shall be prevented from doing so on account of accidents, acts of God or fire, making it physically impossible to so deliver or receive energy or on account of strikes, riots, war, or any other cause beyond reasonable power of control of either party. In the event of inability on the part of the City to deliver the said energy at Newark, or inability on the part of the Company to receive the energy at Newark arising from any of the causes in this paragraph specified, the party so prevented from making such delivery of energy or receiving such energy shall proceed at all possible speed to take the necessary action to enable it to comply with [52] its covenants herein contained.

Seventh: The net proceeds due the City, namely 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered at Newark by it to the Company, shall be paid into the Treasury of the City and County of San Francisco by the Company in monthly installments and not later than the 15th day of each month after operation under this agreement commences. The amount of such payment shall be based upon the amount of energy actually delivered into the system of the Company at Newark during the preceding month. In the event of the refusal, failure or inability of the Company to take the available output of the Moccasin plant deliverable at Newark in accordance with the terms of this agreement, then the

amount of energy which the City could have delivered shall be the basis of computing such monthly payment. The method for determining this amount shall be covered in the memorandum of technical specifications, details and conditions hereinafter provided for.

Eighth: Should the present established rates for the sale of electric energy in San Francisco be hereafter increased or decreased by lawful authority, then the amount to be retained by the Company and the amount to be paid to the City under the terms of this agreement shall be proportionately increased or decreased.

Ninth: Neither this contract nor anything contained herein, nor the prices, rates or charges fixed herein shall ever be offered or in any manner used as evidence by either said City and County or said Company or any successor in interest of either of them in any court or before any commission or official of the State of California or of the United States of America in any action or proceeding in which said City or any successor in interest shall be a party adversary to said Company, or any successor in interest, other than an action or proceeding between [53] the parties hereto, or their respective successors in interest, or one of said parties and a successor in interest of the other, commenced and prosecuted for the purpose of obtaining a judicial or official interpretation or determination of the legality of this contract or of any provision thereof or for the purpose of enforcing its per-

formance, or recovering damages for its non-performance.

Tenth: It is expressly recognized that this contract is a temporary arrangement between the parties for distributing the energy output of the Moccasin plant over and through the Company's lines and system during the period that must elapse before the City can construct or acquire a distribution system of its own.

It is therefore agreed that the contract may be terminated at any time by either the City or the Company upon one day's previous notice in writing to the other.

Eleventh: It is further understood and agreed that this contract is subject to immediate cancellation upon request or demand of the Secretary of the Interior of the United States should he hold that in his opinion the agreement violates any provision of the laws of the United States in general, or the Raker Act in particular.

Twelfth: All of the electric energy to be delivered and received pursuant to the provisions of this contract shall be three phase, 60 cycle, alternating current. The electromotive force of such energy at the point of delivery shall be approximately 105,000 volts, slight variation in voltage and frequency to be permitted.

Thirteenth: The Company shall inspect, test and keep in proper repair all meters and accessories at Newark which will be used for measuring the amount of electric energy consigned to

the Company under this contract. The said meters shall be [54] kept under joint seals of the City and Company which shall not be broken except in the presence of authorized representatives of both parties. Either party shall have the right at any time to request an inspection or test, and if found necessary, proper adjustment of such meters in the presence of a representative of the other party appointed for that purpose. When such inspection or test is desired, sufficient notice shall be given by the party desiring the test, to permit of the other party having its representative present. The registration of the meters shall be used as the basis of determining the amount of energy consigned hereunder, unless, upon being tested, the meters shall be found to register inaccurately and such inaccuracy shall exceed two per cent (2%). Where the inaccuracy is more than two per cent (2%), but the actual inaccuracy can be approximately determined, the readings of such meters shall be corrected and such corrected reading shall be used as a basis for determining the amount of energy delivered. Where the registry of the meters cannot be so properly corrected, the amount of energy delivered during such period of inaccurate registry shall be estimated by the engineers for the parties hereto from the average daily plant output of energy during such period, and from any other available and pertinent data.

Fourteenth: Technical specifications, details and conditions as to the construction of the intercon-

necting lines and switching apparatus at Newark, and as to the maintenance, repair and operation of the power generating plant and transmission system of the City shall be agreed upon by the City Engineer of San Francisco and the Vice President in charge of electrical construction and operation of the Company, and a memorandum of such agreed specifications and operating details shall be filed with and become part of this agreement; provided, [55] that if any changes in said technical specifications or operating details may from time to time become necessary or advisable in the opinion of both of said parties, supplemental memoranda of the same shall be filed, and become part hereof without affecting the remaining terms of the agreement.

Fifteenth: The recitals hereinabove contained commencing with the words "Whereas, the City has now completed the construction of the Moccasin Power Plant," and ending with the words "a great loss of potential revenue to the City and its taxpayers; and" are statements made by the City of its purposes and intentions and concerning other matters contained in said recitals. Said recitals are not and no one of them is made by or on behalf of the Company. None of said recitals shall be binding on either of the parties to this agreement in any dispute, controversy or question which may ever hereafter arise in which the same might otherwise be relevant or pertinent.

In Witness Whereof, the Board of Public Works has caused these presents to be duly executed and

signed by its Members, and the Company has caused these presents to be executed by its officers first thereunto duly authorized by resolution of its Board of Directors, a copy of which is hereunto annexed, the day and year first above written.

BOARD OF PUBLIC WORKS
of the City and County of San Francisco,

By .....

By .....

By .....

Its Members

Attest:

.....

Secretary [56]

PACIFIC GAS AND ELECTRIC COMPANY, a corporation,

By .....

Attest:

.....

Secretary

Section 2. As soon as said agreement is duly executed by the parties therein named, a duly executed copy or certified copy thereof shall forthwith be presented to the Secretary of the Interior of the United States at Washington, D. C. If said Secretary of the Interior shall upon presentation of the agreement to him, or at any time thereafter, announce his disapproval of said agreement, either directly or through the Attorney General of the United States, and direct that the same be cancelled, then said agreement will be subject to immediate cancellation as therein provided.

Section 3. This ordinance shall take effect immediately.

Finally Passed—Board of Supervisors, San Francisco, June 29, 1925.

Ayes: Supervisors Bath, Colman, Harrelson, Hayden, McGregor, McLaren, Morgan, Robb, Rossi, Schmitz, Wetmore.

Noes: Supervisors Badaracco, Deasy, Katz, McSheehy, Roncovieri, Shannon, Welch.

J. S. DUNNIGAN,
Clerk.

Approved, San Francisco, June 29, 1925.

JAMES ROLPH, JR.,
Mayor.

Service by copy of the foregoing original is hereby admitted this 20th day of July, 1937.

H. H. McPIKE,
Attorney for Plaintiff.

[Endorsed]: Filed July 20, 1937. [57]

[Title of District Court and Cause.]

OPINION.

Roche, District Judge: [58]

United States of America vs. City and County of San Francisco.

This is a suit in equity wherein the United States of America, as plaintiff, seeks to restrain the City and County of San Francisco, as defendant, from

continuing an activity which is alleged to be in violation of a restriction attached to a grant of lands by the plaintiff to the defendant. The grant is known as the Raker Act (38 Stats. 241), passed by Congress on Dec. 19, 1913. The restriction in question, contained in section 6 of the Act, reads as follows:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

Pursuant to the Raker Act the City and County of San Francisco built a water and power system. Because the defendant lacked an electric distribution system within its territorial limits and was not able to build or purchase one at the time that electric energy was ready for delivery to consumers, it entered into a contract on July 1, 1925 for the disposal of electricity to the Pacific Gas and Electric Company. The plaintiff claims that under this contract the defendant is disposing of electric energy, developed and transmitted by it through its utilization of the rights granted the defendant in and on government lands by the Raker Act, in violation of the condition or restriction attached to that grant by the above quoted provision in section 6 of the Act. Plaintiff is proceeding to compel compliance under section 9.u of the Act, which reads as follows:

"That this grant is made to the grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:

u. * * * That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act."

Hereinafter for convenience the plaintiff will be desig- [59] nated as the Government, the defendant, as the City or S. F., and the Pacific Gas and Electric Company, as the Company or the P. G. & E.

On August 24, 1935 the Secretary of the Interior rendered an opinion which declared that the City's disposal of electricity under the contract with the Company was in violation of the quoted part of section 6 of the Raker Act. The City, upon being advised of the Secretary's opinion and requested to cease its activity, gave notice that it intended to continue disposing of its electricity under the contract of July 1, 1925 until restrained from so doing by court action. Thereafter the necessary steps were

taken by the Secretary to place the matter in the hands of the Attorney General of the United States, who commenced these legal proceedings as provided for in the Raker Act.

The complaint of the Government alleges that the City is presently selling the electric power, generated by utilization of the grants of the Raker Act, to the P. G. & E. for resale, and that such activity is in violation of the limiting provision of section 6 of the Act. The City denies this allegation and sets up the contract with the Company as exhibit "A" of its answer as a primary defense for the activity which the Government contends is a sale for resale. In addition S. F. maintains that, even if the contract should be construed to be an arrangement for the sale of electricity for the purpose of resale, there are mitigating circumstances which make the issuance of an injunction improper. Estoppel, good faith and reasonableness of actions, balance of conveniences, change of conditions, and impossibility are urged as equitable defenses. Invalidity of the restriction, as in excess of the powers of Congress, is also claimed. These various defenses the court regards as secondary and will subsequently refer to them as such.

Before examining the facts and the law pertaining to the issues raised by the parties, it is necessary to understand the [60] background for the litigation. Therefore the court will present a brief history of the Hetch Hetchy project, with particular reference to the City's activities in the generation and

transmission of electric energy. Thereafter the court will dispose of its problems by an examination of them in the following order; 1. The restriction in section 6 of the Raker Act; 2. The question raised by the City's secondary defenses—the legal effect of the restriction in the grant; 3. The nature of the contract between the City and the Company; 4. Certain arguments made by the City as to the construction of the contract.

History of the Project.

On Dec. 19, 1913 the Raker Act was passed by Congress. It granted certain federal lands and rights to S. F. upon the condition that the water and power to be obtained from the contemplated project would be sold by the City directly to its inhabitants.[1]

The Act was the culmination of persistent efforts on the part of San Franciscans to assure themselves of adequate water and low rate electricity for their growing city. Work was begun on the Hetch Hetchy dam and power stations in the Yosemite region of the high Sierras soon after the Act became law. By 1923 the City was disposing of electric energy which it derived from the Early Intake power station (built as a preliminary unit for the

1. Section 9m of the Raker Act gave to the grantee certain water rights in addition to the lands granted. Since the court does not deem this feature of the Act necessary to the decision, it does not discuss it in the opinion.

construction of Hetch Hetchy itself).[2] On May 8th of that year the National Park Service started proceedings through the then Secretary of the Interior against the City. San Francisco's mode of distribution of Early Intake electricity through the facilities of the P. G. & E. was questioned. After proper hearings it was determined that energy was being *sold** to the Company in violation of the provisions of the Raker Act. Since the Mocassin Creek Power Plant (the chief future source of power for S. F.), was nearing completion at the time this decision was rendered, it was essential that a new plan for distributing electricity be adopted as soon as possible. [61]

To avoid further violation of the law governing Hetch Hetchy power, S. F. entered into a contract with the P. G. & E. in 1925, whereby arrangements were made for the utility company to distribute the City's energy on its behalf. The contract of July 1, 1925 was an attempt to set up an agency agreement which would comply with the terms of section 6 of the Raker Act. Under this contract, City power was to be turned over to the Company at its Newark substation, about 35 miles southeast of S. F. The Company was to pay the City on a 75% load factor

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*Italics in this Opinion are by the Court.

2. Altho Early Intake power was disposed of under a different arrangement from that of the Mocassin Creek Plant until the last few years, the court will treat S. F. power as a unit, since it is now all handled under the contract of 1925.

basis for electricity made available by the Hetch Hetchy power plants.[3] Line losses, estimated at 24% of the energy received by the Company at Newark, were to be deducted from the electricity actually delivered, in determining payments due to the City. Of the money collected from San Francisco consumers of electricity supplied by the Hetch Hetchy power plants, the City was to receive 26.935% and the Company, 73.065%. These proportions were to be applied to the payments made by customers, who were charged 2.383¢ per kilowatt hour at the time the contract went into effect. As rates were varied, the payments were to be adjusted accordingly, so that the percentages remained fixed during the life of the contract between the City and the Company. The City was to be paid by the Company whether the latter used all of the Hetch Hetchy power or not, and whether the Company "load dispatcher" accepted the energy generated in the City power plants at Mocassin Creek and Early Intake in whole or in part. The contract was made terminable on one day's notice by either side or upon the request of the Secretary of the Interior, should he find it to be in violation of the Raker Act.[4]

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3. Load Factor—ratio of the average load to the capacity.

4. This latter provision in the contract must not be confused with section 9u of the Raker Act, under which section the Secretary must start proceedings through the Attorney General, if the Act is being violated by a sale of electricity to a private company for purposes of resale.

In 1925 the new contract between the City and the Company became operative, with the parties to it hoping that the arrangement heeded the admonition against resale of electricity which was set forth in section 6 of the Act. Thereafter verbal and written encounters took place intermittently between the City and the Government, but it was not until 1934 that the [62] present controversy threatened to reach legal proportions. In that year the Secretary of the Interior started an investigation to determine whether S. F. was complying with its obligations under the Raker Act. The results of conferences, hearings and study were contained in an opinion of the Secretary, who concluded that the Act was being violated (plaintiff's exhibit "11") the subsequent proceedings by which a suit arose and reached the United States District Court have been outlined above.

The chief issue to be settled by the court in the present controversy is this: Does the City's present disposal of electric power under the contract of July 1, 1925, made by the City and the Company, violate section 6 of the Raker Act?

The Restriction in Section Six of the Raker Act.

As a necessary preliminary to a study of the contract, the conditions set forth in section 6 must be carefully examined in order to ascertain what kind of arrangement would be permitted between the City and the Company. The court again recites the language in section 6:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the grantee."

What was intended by Congress when it placed this prohibition in the Raker Act? An approved method of approach for obtaining an answer to this question was stated in the case of Oregon and California Railroad v. United States (1915), 238 U. S. 393 at page 417, where the Supreme Court said: "To construe a statute we must realize its inducements and aims, solving disputes about them by a consideration of what might accomplish or defeat such aims."

The aims of the Raker Act were made apparent by both the [63] Senators and the Representatives who discussed the bill during the months preceding its passage in 1913. Pertinent remarks are those of Representatives Summers, Raker and Thompson before the House of Representatives and of Senator Norris before the Senate:

> Representative Summers: "Is it the purpose of this bill to have San Francisco supply electrical power and water to its own people?" Representative Raker: "Yes." Representative Summers: "Or to supply these corporations, which will in turn supply the people?" Representative Raker: "Under this bill it is to sup-

ply its own inhabitants first. * * *"—Congressional Record, Volume 50, p. 1905. (1913)

Representative Thompson: "* * * San Francisco may sell this water or electric energy to whom? * * * under this section (six), it is absolutely impossible for San Francisco to sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of reselling it."

In response to the question of a Congressman who feared that a private company might resell electricity which the company had purchased from the City: "And it should be added that that lessee, unless it is a municipal corporation, is by the terms of the bill confined to somebody who wants to use this for consumption."—Congressional Rec., Vol. 50, p. 4097.

Senator Norris: "* * * This bill is not giving to a private corporation any power. It is giving to the people of the locality of San Francisco the right to use a cheap power when it is developed. * * * This proposition is to harness that power and to put it to public use, not to give it to a private corporation. Why do we want to develop water power? Will we give it to the public or to a private corporation?

"Here is an instance where we are going to give it directly to the people, if we pass the bill."—Cong. Rec., Vo. 51, p. 343.

Thus it must be inferred that section 6 was enacted to insure the direct distribution of water and power by the City to its inhabitants. The language of the section makes it clear that no private corporation was to enjoy any profits from the government grant, which was to be enjoyed in its entirety by the consumers.

Secondary Defenses.

Before approaching the chief issue in the case, the court will give its attention to what has been previously characterized as the City's secondary defenses. The basis for all of these defenses is the City's contention that the provision in section 6 which is alleged to be violated is not to be viewed as a valid and enforceable law but is at most a covenant dependent for its enforcement on the same principles of law and equity as [64] are applicable to a similar covenant between private parties. The Government asserts that the disputed section is a law, and entitled to the sanctity of a law. Since the effect of the City's secondary defenses hinges on the court's interpretation of section 6, the status of that section will be determined.

Congress does not have power to prescribe the regulations for the sale of electricity by a municipality. From this premise, the City argues that section 6 of the Raker Act is not a law but is a simple contract between the grantor and the grantee. To the Government's contention that the Act is a law in its entirety, S. F. replies that the conditions

imposed in the grant are set up by the Government acting in a proprietary rather than a sovereign capacity and that as to these conditions, the Government is in the same position as a private person, who would make the same sort of contract.

This line of reasoning is not sound. The fact that the federal government may lack the power to impose direct police regulations does not mean that any regulatory measure which is passed as an integral part of a valid piece of legislation cannot be enforced except as a simple contract. One part of a statute is as much a law as is any other part of the enactment. If Congress has the power to include a policing condition in a grant, then that condition is entitled to the full force of the law. Oregon & Cal. R. R. v. U. S., above; Wisconsin Gen. R. Co. v. Forsythe (1895) 159 U. S. 46, 55; Missouri, etc. R. Co. v. Kansas, etc. Ry. Co. (1877) 97 U. S. 491, 497; Schulenberg v. Harriman (1874) 21 Wall. 44, 62, and numerous other authorities hold that a granting act is a unified *law* as well as a grant. It is not subject to partition to suit the whims of the grantee.

Authority for a conditional grant of federal lands is found in Article IV, section 3 of the Constitution, which reads:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States."

The following language from Light v. U. S. (1910) 220 U. S. 523 at [65] pages 536 and 537, indicates the scope of the rule making power of Congress, as expressed by the Supreme Court:

> "The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely. * * * It is true that the 'United States do not and cannot hold property as a monarch may for private or personal purposes'. * * * But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, section 3 Article IV, that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States'. 'The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property.' * * *
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> "'All the public lands of the nation are held in trust for the people of the whole country.' * * * 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'"

To the same effect are Utah Power and Light Company v. U. S. (1917) 243 U. S. 389 and Ruddy v. Rossi (1918) 248 U. S. 104.

In the Hetch Hetchy grant, there is an enactment of what Congress deemed to be "Needful rules and regulations" for the administration of federal lands granted to the City and County of San Francisco. It should be clear that the Government has power to make such rules and impose such conditions in conjunction with grants of its lands, and that those rules take on the force of law when the grant in which they are contained is itself made by Congress acting in its law making capacity. Such is the situation in the case at bar. The limitation on the distribution of electric energy was within the law making power of Congress, since it was directly connected with a grant of federal lands (Art. IV, sec. 3). The collateral nature of the condition—distribution of electricity *over* the lands—is well within the land disposal power of Congress (Ruddy v. Rossi, above).[5]

A careful reading of the above quoted clause of the Constitution and a review of the cases governed by it, lead the court to hold that Congress has express power to impose the condition which is set forth in section 6. If S. F. wished to enjoy the benefits of the grant, it was compelled to assume the burdens, however onerous they may have been.

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5. In this case, lien limitations, placed on complete strangers to lands patented by the Government, were sustained as valid conditions imposed by the Government in disposing of its lands. Such limitations obviously did not deal with the actual use of the lands patented.

The law in the case of Oregon & Cal. R. R. v. U. S., above, [66] is generally applicable to the present situation. Because that case effectively disposes of the City's secondary defenses, the court will summarize the opinion, and quote freely from the language used by Mr. Justice McKenna:

By amendatory acts of Congress in 1869 and 1870, certain public lands were granted to railroad companies, subject to numerous conditions touching upon the use and disposal of the lands granted.[6] For some time the railroads complied with the requirements contained in the grants. But afterwards the conditions imposed by the Government were openly violated. Such conduct, persisted in over a period of years, finally led to a suit whereby forfeiture was sought by the United States Government, or, in the alternative, an injunction against further violation of the grants.

After concluding that the restrictions in the grants were not conditions subsequent which entitled the Government to forfeiture, but that they were enforceable covenants, the court ruled that *neither estoppel, waiver, reasonableness, nor any other equitable argument merited consideration in*

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6. The disputed limitation in the Oregon case was upon the alienation of the lands granted; the restriction in the principal case is upon the use of the lands. Both limitations are "needful rules" within the land disposal powers of Congress, despite their differenf purposes.

view of the fact that a law was involved.[7] In showing that the right to equitable relief does not require the plaintiff to prove damages in such an action, the court said, at page 422: "The language of the grants and the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. Assent to them was required and made, and we cannot import a different measure of the requirement and the assent than the language of the act expresses. It is to be remembered the *acts are laws as well as grants and must be given the exactness of laws.*" (Emphasis supplied.).

The argument was presented that the character of the lands was such that it was not possible for the railroads to comply with the conditions imposed in the grants. The court was not impressed by this defense, and said, on page 428: "The [67] character of the lands furnished no excuse. It might have justified non-action, but it did not justify antagonistic action."[8] The conditions in the land grants were then found to be enforceable and the railroads were enjoined from further violation of them.

The above summary shows that the Oregon decision is controlling in the principal case on the sec-

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7. It is to be noted that the various defenses in the Oregon case and those in the principal case are almost identical.

8. The "impossibility" defense of the City is answered by this statement.

ondary issues raised by the City.[9] The defenses set up by S. F., except for the nature of the contract itself, are immaterial because, as Mr. Justice McKenna said in the Oregon case at page 435: "Judgment is independent of them. It is determined by the simple words of the acts of Congress, not only regarded as grants, but as laws and accepted as both; granting rights but imposing obligations—rights quite definite, obligations as much so. The first had the means of acquisition; the second, of performance; and, as we have pointed out, whatever the difficulties of performance, relief could have been applied for and, it might be, have been secured through an appeal to Congress. Certainly evasion of the laws or the defiance of them should not have been resorted to."

The Raker Act was passed by Congress acting in its lawmaking capacity. The enactment is a law in its entirety; therefore the court, in accordance with the ruling in the Oregon case, must dismiss the secondary defenses relied upon by the City and turn to the agreement between the City and the

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9. Considerable evidence was presented at the trial, subject to the Government's motion to strike, dealing with the secondary issues; other evidence on these same issues was excluded. In submitting the case, both sides have made motions with respect to this evidence—the Government, to strike it; the City to reopen the case for the purpose of introducing the rejected evidence. The Oregon case makes it clear that the court must grant the motion to strike and deny the motion to reopen.

Company to determine whether it is a contract for the sale of electricity for resale or a contract of agency whereby the City distributes its own power thru an agent.

Nature of the Agreement Between the City and the Company

The Government has alleged that the City is not distributing energy thru the Company as an agent, but is selling electricity to it for resale in violation of section 6 of the Raker Act. The City denies this allegation and contends that it has [68] entered into an agency agreement whereby it distributes its own power.

How is the court to distinguish agency from sale? The intent of the parties, as shown by the language used in the instrument before the court, will be given weight in determining whether an agency relationship has been established. But the substance of a contract controls its construction despite any language of consignment which may be used. Greenough v. Wilcox (1927) 238 Mich. 52, 213 N. W. 175; Chezum v. Kreigbrum (1892) 4 Wash. 680, 30 P. 1098; Standard Co. v. Houston Co. (1921) 258 U. S. 346; Straus v. Victor Talking Machine Co. (1916) 243 U. S. 490, 498; Ex parte Flannagans (1875) Fed. Cas. No. 4855; Vt. Marble Co. v. Brow (1895) 109 Cal. 206, 41 P. 1031; 1 Mechem, Sales #46, p. 45; Restatement of Agency #1, b. The instrument must be dissected into its component parts, which, under close scrutiny, must reveal true

agency. This method of analysis is recognized as proper in Marriman etc. Inc. v. Fort Dodge Serum Co. (1931) 47 F2d 458, where it is said at page 460 by Judge Booth:

> " . . . In recent times, the real or supposed needs and exigencies of business and the ingenuity of business men and of their lawyers have evolved a class of contracts which have the earmarks of both sale contracts and factorage contracts. It is not always easy to determine into which class a particular contract falls. If it becomes necessary to decide the question, all the court can do is to consider the various earmarks as disclosed by the contract, and the surrounding facts and circumstances, and determine, as best it can, into which class the contract should be placed."

Mechem analyzes the essential characteristics of an agency to sell as follows:

> "The essence of agency to sell is the delivery of goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to fix the price and terms, to recall the goods, and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a price for them before sale or unless sold by the agent." 1 Mechem, Agency (2d Ed.) #48, p. 30.

With these elements of agency before us, we shall consider the contentions of the Government and the City by asking the following questions:

1. Who controls the product—the alleged principal or the agent? [69]

2. Who assumes the risk of loss?

3. Upon what basis is payment to be made to the alleged principal?

4. Who fixes the price and terms of sale?

5. Who purchases the product?

6. How are collections made from purchasers?

7. What is done with the proceeds of sales?

8. How does the alleged agent account to the principal?

9. How does the alleged principal make its own purchases?

10. When does the relationship terminate?

The answers to these questions will enable the court to decide what kind of agreement has been entered into by the City and the Company.

Under the contract, who controls the Hetch Hetchy electricity—the alleged principal or the agent? Hetch Hetchy power is to be delivered to the Company's Newark substation, where it becomes a part of the Company's energy. Thereafter control is entirely in the hands of the Company, whose load dispatcher directs the movements of the electricity after determining how much electricity will be accepted in the first instance. The City has no further interest in the power except the receipt of money for its delivery to the Company. Supervision rests

in the load dispatcher. Such control by the Company points toward a sale, since agency is characterized by control being retained by the principal (Black v. Webb (1851) 20 Ohio 304, 55 A. D. 456; Restatement of Agency #1 and #14b).

Does the alleged principal assume the risk of loss? Based on experience gained prior to 1925, distribution losses amounting to 24% of the energy delivered at Newark are to be deducted from the total delivered, and payment on such balance is to be 26.935% to the City and 73.065% to the Company of the average revenue to be derived from the sale of the power, such revenue amounting to 2.383¢ per kilowatt hour—computed on the rates of 1924. The deduction of 24% from the energy delivered at Newark in fixing the amount due the City, is an attempt to place the risk of line losses on the City, as the principal. [70] While it may be argued that this provision is at least indicative of agency, it is not unusual in sales contracts for the parties to require the seller to assume the risk. Furthermore, in the principal case, the deduction term may be present simply as a necessary factor in determining the correct price to be paid the City for its electricity.[10]

Upon what basis is payment of money, collected from consumers of electricity to be made to S. F.?

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10. It is worth noting that under the accounting system of the Company, no risk of credit loss is placed on the City, although such risk is often found in agency relationships.

Under the written contract, proceeds from purchasers of electric power are to be paid on a proportional basis. The City alleges that proportional payment is normally found in agency agreements.[11] If this is so, and the instant contract set up an agency relationship, then a change in rates *would* cause a proportional change in the amounts received by the City and the Company. Actually, no changes in revenue payments to the City have been made since 1925, despite several reductions in Company rates. The price paid S. F. has remained constant, despite the provision for proportional payment which is contained in the contract.

Conduct is entitled to the court's attention, especially when a written instrument is drafted in order to satisfy the requirements of a specific statute. If the price which S. F. receives under the contract is actually fixed, this is strong indication of a sale (In re Rabeau (1902) 118 F. 471; City of San Antonio v. Chas. M. Steiff, Inc. (1935) Tex. Civ. App., 83 S. W. 2d 357).

It has been argued by the City that increased consumption of electricity has tended to keep rev-

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11. The proportional payment basis does not preclude a sale from being consummated. This is made plain in the case of Public Utilities Commission v. Landon (1918) 249 U. S. 236, where a sale of gas was found under a contract by which the seller and the buyer were paid on a percentage basis. Although the Supreme Court did not discuss the agency question, it played an important role in the decision of the lower court and undoubtedly influenced the appellate body.

enue almost constant, thus obviating the necessity for periodical adjustments; that is to say, consumption has increased directly and automatically with the lowering of rates. However, the failure of the Company to request changes in payments to the City, upon sizable rate reductions and correspondingly reduced returns, is best explained by the theory that before such lowering of rates, the Company was enjoying more than its contract share of the income received from consumers of electricity; that with the reduction of rates, [71] the Company received less than the sum to which it was entitled under the contract with the City, and thus, over a period of years, a close approximation to the contract percentages was maintained. But such compliance with the contract payment provisions—by averaging the returns to the City—does not spell agency. The fact that payments have remained constant since 1925 points toward a sale of electricity to the Company at a fixed price.

If the Company would not be able to accept and distribute the power offered it; payment must nonetheless be made to the City on the basis of the energy which it *could* have delivered to Newark. Electricity is to be paid for on a 75% load factor basis regardless of actual sales to consumers. Duty to pay for a product whether it is accepted or used is normally found in a contract of sale. (Swift & Co. v. Columbus etc. Electric Co. (1926) 17 F2d 46, in which there was a duty to pay for electricity under a sale contract; no question of agency was

involved. In re Sachs (1929) 31 F2d 799; Ferry Co. v. Hall (1914) 188 Ala. 178, 66 So. 104; Coweta Fertilizer Co. v. Brown (1908) 163 F. 162; Peoria Mfg. Co. v. Lyons (1894) 153 Ill. 427, 38 N. E. 661; 1 Mechem, Sales, #43, p. 41.) Such a duty is very rarely discoverable in an agency contract, except on an option basis. (In re Thomas (1916) 231 F. 513.) In fact, a provision in a contract by which the seller is assured of a payment for his goods, regardless of the buyer's ability to dispose of them, is so important in establishing a sale that the California Supreme Court, in the case of Los Angeles Gas & Electric Co. v. L. A. (1922) 188 Cal. 307, 205 P. 125, indicated that the difference between agency and sale might well hinge upon such a duty-to-pay requirement.

In the Los Angeles case, as in the S. F. controversy, a dispute arose over the distribution of electricity owned by the city. The Los Angeles charter forbade the sale of energy to a private company which intended to resell it. The city was transmitting its power over the facilities of two private com- [72] panies. The agency contract under which the companies were operating was challenged. The question before the court, as in this case, was one of interpretation of an instrument to determine whether it gave rise to an agency or a sale contract. The court ruled that the contract was one of agency and that the city charter was not being violated. Of the numerous provisions which the court studied, no one alone convinced the judges that the contract

was within the requirements of the charter. However, the absence *or* one provision—which is present in the case at bar and with which the court is now dealing—impressed the court enough to warrant the following dictum at page 316:

> "It would seem that the determination as to whether or not the so-called operating agreement is in effect a sale of electrical energy at wholesale to the contracting companies, or is a method of distributing the power of the city to its consumers, would turn in part upon the question as to whether or not the return to the city would be regulated solely with reference to the quantity of power furnished by the city. If the contract was so arranged that the city would at all times receive a definite amount for the power furnished, regardless of the hazards of the business or the expense of distribution, then it might be argued with some force that it was a sale within the meaning of the charter prohibiting such a transaction."

The court has already pointed out that in the principal case the City was to receive a definite amount for Hetch Hetchy electricity, regardless of actual demand for the energy by the Company. The P. G. & E. has a duty to pay S. F. for electricity available at Newark, on the basis of a 75% load factor. That duty might not be fatal to an agency contract; but it deserves fully as much weight as the Los

Angeles case would give it.[12] In a normal agency, the agent effects a transfer and is not responsible for payment unless the commodity is actually delivered to him and sold by him.[13]

Who fixes the price at which electricity is to be sold to consumers? Rates to be charged consumers are not fixed by the City. They are expressly left in the hands of the State Railroad Commission. When prices are set by the one who disposes of the commodity, then the transaction is normally one

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12. Defendant, in presenting its agency arguments, placed much reliance on the Los Angeles decision. In addition to the duty-to-pay provision which is present in the S. F. case and absent from the Los Angeles contract, the two cases are further distinguishable. The contract between Los Angeles and the private companies provided that the city buy 25,000 horse power of electricity, so that *all* energy in the lines would be owned by the city, and the companies would act solely in the capacity of distributing agents. Under the contract between S. F. and the Company, the power which the latter distributes is the City's electricity in part only. Because of the nature of electricity, it is almost essential that *all* energy be owned by the City if it would enter into an agency relationship. This will be explained by the court in its opinion.

13. As a practical matter, S. F. has been able to utilize the full capacity of Hetch Hetchy power even during off-peak periods. Thus the Company has not been forced to pay for electricity which it has neither accepted nor sold. The written contract is inconsistent with an agency agreement, but the fulfillment of its duty-to-pay provision is not. As carried out, the 75% load factor term has meant that preference is given to Hetch Hetchy energy by the Company, when consumer demand is low.

of sale. (In re Wayside Furniture Co. (1933) 67 F2d 201; City of San Antonio v. Chas. M. Steiff, above; Chickering v. Bastress (1889) [73] 130 Ill. 206, 22 N. E. 542.) It is true that the Company does not fix rates, since it is a public utility whose schedule of charges is in the hands of the Railroad Commission. But the very fact that the Commission, instead of the City, fixes rates tends to exclude the possibility of agency. The Constitution of California (Art. XII, sec. 23), declares that municipalities are not subject to commission regulation as are the private companies which serve as public utilities. If the P. G. & E. were acting as an agent on behalf of the City, then S. F. would be the proper party for fixing its own rates. The fact that the City does not set its rates is indicative of a sale. However, since the City does not furnish *all* the electricity which is supplied to S. F. consumers, it would not be possible for the City to fix charges for electricity supplied by it. Feasibility requires the present mode of rate fixing, notwithstanding the fact that a principal ordinarily sets the prices at which his agent will sell goods.

Who purchases the electricity? How are the purchasers billed? What is done with the proceeds from the sale of electricity? Electricity is to be disposed of by the Company to its usual customers, in the normal course of retail trade; customers are billed in the name of the Company, and money which is so collected from them is mingled with Company funds.

Disposal of goods to regular customers in the usual course of trade indicates a sale (Public Utilities Comm. v. Landon, (1918) 249 U. S. 236), as does the billing of goods in the name of the retailer (except in an undisclosed agency). Commingling of funds collected from purchasers is characteristic of a sale (In re U. S. Electrical Supply Co. (1924) 2 F2d 378). To justify the mingling of *funds*, the City relies upon numerous grain cases. But a glance at these citations will show that they stand for the proposition that a mingling of goods is not considered irregular in many agency contracts. However, the grain broker, when serving as an agent, customarily keeps sepa- [74] rate accounts for those with whom he transacts business. Of necessity certain products must be mingled, but the proceeds from their sale are placed in the different accounts of each contributor according to his prorata interest in the whole. Electricity, while different from grain, has been held to be personal property for legal purposes, and subject to the rules governing personal property. (Terrace Water Co. v. San Antonio, etc., Co. (1905) 1 Cal. App. 511, 82 P. 562; Lothrop Theatres Co. v. Edison, etc. Co. (1935) 290 Mass. 189, 195 N. E. 305, 307.) Thus the funds collected from S. F. consumers would be kept separate were this an agency contract. But again, the nature of the product makes this separation impossible, except on an arbitrary basis.

Does the Company submit a record of its electric sales to consumers, to the City at the end of each

month? No accounting is made to the City, which simply bills the Company for electricity transmitted to Newark. The accounting procedure is limited to the delivery by the City to the Company, altho in an agency relationship the agent accounts to the principal. Of course, where information is available to the principal, there is no real need for an accounting. In the case at bar the City can obtain considerable statistical information, by requesting a monthly report from the local utilities commission. But such report would not disclose the percent of S. F. electricity sold to the public, for the nature of the product prevents such a record from being kept.

What is the arrangement for the purchase of electricity by the alleged principal from the agent? The City itself purchases electricity from the Company just as any other customer does. Yet purchased by the principal from the agent are very uncommon in agency contracts; they are inconsistent with an agency interpretation; instead they constitute proof of sale.

When does the relationship between the City and the Company end? The contract between the City and the Company is terminable upon one day's notice by either party, or upon request of the [75] Secretary of the Interior, if he should find that it violates the Raker Act. Such a cancellation provision may be indicative of agency (In re Galt (1903) 120 F. 64). But it is of only slight significance in the S. F. case because an important reason for the

one-day provision is made manifest by the second ground upon which cancellation may be brought about, namely, a violation of the Raker Act.

The following review of the analysis which has been completed will show that the agreement between the City and the Company is clearly one for the sale of electricity:

1. Control of Hetch Hetchy power is in the hands of the Company from the moment that City electricity enters the Company lines at Newark.

2. The price which S. F. receives for its Hetch Hetchy power has remained fixed, despite fluctuations in Company income.

3. The 24% deduction of electric energy from the amount of Hetch Hetchy power delivered at Newark—based on line losses of electricity between Newark and S. F.—is a factor considered in ascertaining a fair price for the sale of electricity by the City to the Company.

4. There is a duty imposed upon the Company to pay for Hetch Hetchy power on a 75% load factor basis, regardless of Company needs.

5. Rates to be charged consumers of Hetch Hetchy power are not fixed by the City.

6. Hetch Hetchy power is disposed of by the Company to its usual customers in the normal course of business.

7. Consumers of Hetch Hetchy power are billed in the Company name.

8. Accounting between the City and the Company is limited to S. F.'s billing the P. G. & E. for

Hetch Hetchy power delivered at Newark each month.

9. The City is itself a purchaser of Hetch Hetchy power from the Company. [76]

10. The Secretary of the Interior may request a cancellation of the contract, should he find it to be in violation of section 6 of the Raker Act.

There is no clear cut line which divides sales contracts from agency agreements. If the earmarks of sale predominate, then a sales contract exists. The fact that individual sales provisions may be explained away, on the ground that their presence has been tolerated by courts which have found them in agency relationships, does not lend weight to an agency interpretation; and when such sales provisions appear together, they are strong proof of a sale. In the principal case the elements of sale compel the court to declare the contract to be one of sale, with title to the electricity passing to the Company at Newark. Viewed in the light of the history of the Raker Act, the present arrangement is seen to comply neither with the letter nor the spirit of the federal grant by means of which S. F. was enabled to construct the Hetch Hetchy project.

The nature of the product is one explanation for the kind of contract which was entered into by the City and the Company, and also, for the Government's contention that even an agency agreement might be beyond the limitations imposed by section 6 of the Raker Act. Electricity has been defined

in Webster's 1937 dictionary, as "an imponderable and invisible agent producing light, heat, chemical decomposition, and other physical phenomena". This unknown agent has been declared to be personal property for legal purposes; but it is a peculiar kind of property which cannot be stored in sizable quantities and cannot be allocated on a pro-rata basis when a commingling occurs. Because of its mysterious character, and the difficulty of handling it thru agency facilities, any contract which deals with its disposal under a *pooling* arrangement must necessarily contain numerous elements which are usually found in sales contracts. These elements may not entirely preclude an agency relationship; yet, when combined with fundamental sales provisions, they make [77] the agency relationship extremely improbable. If all the electricity supplied to the inhabitants of a municipality should be owned by the municipality, an agency relationship for the distribution of electric energy might be set up, without perverting the meaning of the word "agency"; but where only some of the electricity is furnished by the municipality, it is doubtful whether a true agency contract could be drafted.

Arguments as to Construction of Contract

The City, in addition to submitting its own reasons for interpreting the contract with the Company as one of agency, has suggested that the construction placed upon the instrument by several federal officers is controlling. It is alleged by S. F. that responsible government officials have already passed

upon the contract; that they have indicated that it is an agency agreement; that their contemporaneous opinions are entitled to the respect of the court.[14]

It is true that the contemporaneous construction of a contract by government officials must be given weight in determining its nature. But the doctrine of contemporaneous construction relied upon by the City refers to the construction of the instrument which must be administered by government officers, and not to some other document, such as the contract in the principal case. This is made plain by defendant's own quotation from 59 Corpus Juris 1025, #609:

> "The contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it, is entitled to more or less weight, especially if such construction has been made by the highest officers in the executive department of the government."

Thus it is apparent that the opinion of the Secretary of the Interior must be given due regard when it is applied to the Raker Act. But the Secretary's views about a private contract are not entitled to the same consideration, even tho an interpretation of that contract is necessary in order to invoke the statute. If, however, the court should treat the

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14. The contemporaneous construction argument was also presented in support of the City's estoppel defense, which the court has disposed of under the doctrine of the Oregon case.

contract be- [78] tween the City and the Company as so closely related to the Raker Act as to apply—by analogy—the rule that an interpretation of a statute by a department head must be given great weight (U. S. v. Jackson (1930) 280 U. S. 183; Bates & Guild Co. v. Payne (1903) 194 U. S. 106; People v. S. P. Co. (1930) 209 Cal. 578, 290 P. 251), then what may be learned about the agreement before the court?

Shortly after the controversial contract was put into effect, the instrument was shown to the then Secretary of the Interior. No complaint was registered by the Secretary after his examination of the document. Yet it cannot be said that his silence amounted to an express sanction of its provisions. His negative behavior might be an indication, at best, that he considered the contract a temporary stop-gap until such a time as the City would be able to acquire its own distributing system. Neither the Secretary in 1925 nor his immediate successors made a serious effort to interpret the contract for purposes of challenging it or approving it, for all of them expected the City to fulfill its obligations under the Raker Act. In 1934 for the first time an exhaustive study of the contract was made by the incumbent Secretary, Ickes, and he concluded that it resulted in a violation of section 6 of the Raker Act. The opinions of the prior Secretaries were seldom expressed. When statements were issued, as in the case of the Secretary in office in 1930, they

were not favorable to the City's contentions (Transcript 127½, Defendant's Exhibit "B"). Toleration of the contract over a period of years does not lend much weight to an agency interpretation; the opinion of the now Secretary of the Interior supports a sales construction. The doctrine of contemporaneous construction thus fortifies the interpretation of the contract already made by the court.

Where a valid law is enacted, there must be compliance with its provisions. An injunction is the proper remedy for [79] compelling such compliance (Oregon & Cal. R. R. v. U. S., above), unless money damages will afford adequate relief (World Exposition v. U. S. (1893) 56 F. 264). The injury to the Government caused by the City's violation of the Raker Act cannot be measured in terms of money damages. Therefore S. F. must observe the conditions in the Raker Act. If a law is unworkable, it must not be circumvented by those whom it binds; rather an effort should be made to have the law amended by the Congress. The Raker Act is a valid law, the provisions of which S. F. must obey. A violation of this law the court must enjoin regardless of the reason for the violation (Oregon & Cal. R. R. v. U. S., above). Section 6 does not permit a sale of electricity to a private corporation for purposes of resale. The Raker Act is not being complied with by S. F. Under these circumstances, the court holds that the Government is entitled to an injunction directing the City to cease its present disposal of electric power or be restrained from using

the rights granted by the Raker Act for the generation and transmission of such power.

Such injunction, however, will not be made immediately operative. At present S. F. is collecting in excess of $2,000,000 per year from the Company; there has been intimation that the Hetch Hetchy power is a necessary augmentation of the Company's system; the City has been operating under the contract with the Company for almost thirteen years; a sudden disruption of operations would result in serious economic waste. These factors weigh heavily with the court. In order that the City may face its problem and comply with its obligations under section 6 of the Raker Act, the court will make its injunction issuable forthwith, but effective six months from the date of its issue.

This opinion may stand in lieu of the written findings of facts and conclusions of law. Each party is to pay its own costs.

Dated: April 11, 1938.

MICHAEL J. ROCHE
United States District Judge. [80]

[Endorsed]: Filed Apr. 11, 1938.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial in the above entitled court, Honorable Michael J. Roche, Judge of said court presiding, on Octo-

ber 19, 1937, the plaintiff United States of America being represented by its attorneys Frank J. Hennessy, United States Attorney for the Northern District of California, W. E. Licking, Assistant United States Attorney, and Frederic L. Kirgis; the defendant City and County of San Francisco being represented by John J. O'Toole, City Attorney, Dion R. Holm, Assistant City Attorney, and Robert M. Searles; whereupon evidence both [84] oral and documentary on behalf of the parties was offered and received and the cause regularly continued to October 21, 1937, at which time leave was granted the parties to file briefs, and said briefs having been filed and the matter argued orally by the parties on March twenty-first, and twenty-second, 1938, and the case having been submitted to the court for its decision on the latter date; the court having duly considered the evidence and the briefs and arguments of counsel and having on April 11th rendered its decision herein in favor of plaintiff together with its written opinion in support thereof, and being fully advised in the premises, now makes the following special findings of fact and reaches the following conclusions of law:

Findings of Fact

I.

The defendant City and County of San Francisco, hereinafter referred to as the City, is a municipal corporation of the State of California.

The Pacific Gas & Electric Company, hereinafter referred to as the Company, is a private California corporation, engaged in the business of distribution and sale of electric energy in the City and County of San Francisco and elsewhere.

II.

For a number of years prior to December 19, 1913, the City had been seeking to assure itself of adequate water and low rate electricity by a plan known as the Hetch Hetchy project. By the terms of the Raker Act of December 19, 1913 (38. Stat. 242) the United States, acting through the Congress [85] granted to the City lands and certain rights and privileges in its lands; among the rights and privileges so granted was the right to utilize the granted lands and their appurtenant resources for the development of electric energy, including the storage and transmission of water necessary for the generation of electric energy and the transmission of electricity generated.

The grant so made by the United States was conditional upon the acceptance by the City of the terms and conditions therein specified.

III.

Thereafter, the City of San Francisco, through an ordinance passed by its Board of Supervisors and approved by its Mayor, January 13, 1914, did accept said grants contained in the Raker Act and acquiesced in, and became bound by the terms and conditions thereof.

IV.

To insure the direct distribution of water and electricity by the City to its inhabitants, and to prevent enjoyment by private corporations of any profits from the Government grant, it was provided in the Raker Act:

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it by the said grantee."

V.

Prior to July 1, 1925 the City had entered into the use and enjoyment of the lands, rights and privileges granted by the Raker Act and was then, and is now, generating and [86] transmitting electric energy through its utilization thereof.

VI.

The lands and rights acquired by the City from the United States are indispensable to the operation of the City's Hetch Hetchy project, although it includes lands and rights other than those acquired from the United States under the Raker Act.

VII.

On July 1, 1925 the City entered into a contract with the Company for the distribution and sale of electric energy generated by the City at its

Moccasin Creek Power Plant, part of the so-called Hetch Hetchy project. A true and correct copy of the contract is filed with the City's answer, marked "Exhibit A" thereof, and is made a part of this finding by reference.

VIII.

Since July 1, 1925, electric energy originating at the Moccasin Creek Power Plant of the City, and since late in 1935, the electric energy originating at the City's Early Intake plant, all generated and transmitted through utilization of the lands, rights and privileges granted to the City by the United States, has been, and is now being delivered to the Company under the terms of the contract executed between the the City and the Company on July 1, 1925. Electric energy generated at both plants is hereinafter referred to as that originating at Hetch Hetchy. [87]

IX.

Under the contract, by its terms, and as shown by the activities of the contracting parties thereunder:

1. Power developed by the City at Hetch Hetchy is delivered to the Company at its Newark substation, 35 miles southeast of San Francisco. Determination of how much electricity shall be accepted at any given time is made by the load dispatcher of the Company, the Company's dispatcher actually giving the orders which control the opera-

tion and output of the City's plants. From the time electric energy originating at Hetch Hetchy enters the system of the Company at Newark the City is without power over, and the Company has exclusive and entire control of, its disposition.

2. In determining the amount which should be paid to the City, it is provided that from the amount of energy delivered to the Company at Newark, 24 per cent shall be deducted as representing the amount of transmission, sub-station and distribution loss between time of receipt of *receipt of* the energy from the City by the Company at Newark and delivery to the ultimate consumers. Deduction of 24 per cent of the Hetch Hetchy energy delivered by the City to the Company at Newark is simply a necessary factor in the formula for ascertainment of the amount to be paid by the Company to the City as a fair price for such energy.

3. By the terms of the contract the Company is required to "account for and pay over to the City for the energy so consigned and delivered to it by the City of Newark for transmission and distribution to consumers as provide in this contract 24.935 per cent of 2.383 cents per kilowatt hour, (the average revenue received by the Company in 1924) for 76 per cent of the energy so consigned [88] and delivered by the City to it at Newark. And the Company shall retain * * * 73.065 per cent as its compensation for services rendered under this contract." The proportional percentages

—26.935 and 73.065—were to remain fixed during the life of the contract between the City and the Company. As rates varied, amounts of payments to the City were to be adjusted accordingly.

In actual practice the amount per unit received by the City for its electric energy delivered under the contract has remained constant, despite several reductions in the rates charged by the Company and appreciable fluctuation in the average amount per unit received by the Company from its sale. The price, therefore, which the City receives for its energy under the contract is in practice fixed and without relation to the actual revenue received from its sale to consumers.

4. With exceptions here immaterial the Company accepts at Newark the entire output of energy from Hetch Hetchy at not to exceed a 75 per cent monthly load factor. Monthly payments by the Company to the City are based upon the amount of energy actually delivered into the Company's system at Newark; or, in event of failure of the Company to take the available output of the City's plant deliverable at Newark under the contract, upon the amount which the City could have delivered at a 75 per cent load factor. The City is assured of payment and the Company is under an absolute duty to pay for the amount of electric energy specified without regard to its acceptance or use.

5. The rates charged to consumers of electric energy originating at Hetch Hetchy are fixed not

by the City but by the State Railroad Commission. Under the State Constitution, municipalities are not subject to commission regula- [89] tion, and as a principal the City has power thereunder to fix rates for electric energy produced by it, and sold by an agent, if there be an agent.

6. Electric energy originating at Hetch Hetchy is disposed of by the Company to its usual customers in the normal course of its retail trade.

7. The Company is the sole creditor named in the statements of account furnished by it to purchasers of electric energy including that originating at Hetch Hetchy.

8. Moneys collected by the Company from consumers of power are in no way, arbitrarily or otherwise, segregated or apportioned with regard to the portion thereof deemed attributable to power produced at Hetch Hetchy.

9. To the City the Company makes no accounting of its sales of electricity to consumers. Accounting between the two is limited to monthly statements by the City to the Company for electricity delivered at Newark.

10. The City is itself a purchaser from the Company of power, part of which originates at Hetch Hetchy, and on terms which have no relation to those specified in the contract for sale of Hetch Hetchy power to the Company by the City.

11. The contract is terminable by either the City or the Company upon one day's notice; and is

by its terms subject to cancellation upon request of the Secretary of the Interior should he determine the agreement to be violative of any section of the Raker Act.

X.

The contract between the City and the Company is a contract to sell for resale, and the disposal of electric [90] energy thereunder by the City to the Company constitutes a sale for resale of, electric energy generated by the City at Hetch Hetchy. The contract to sell contemplates, and the sale of energy thereunder includes, a sale or letting to the Company of the right to resell or sublet the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark.

XI.

The contract between the City and the Company and the disposal of electric energy thereunder by the City to the Company includes a sale or letting by the City to the Company of the right to resell or sublet the electric energy so delivered by the City to the Company.

XII.

The Secretary of the Interior is designated by the Raker Act to safeguard the interest of the United States in its grant. Pursuant to such duty imposed by the Act, the Secretary of the Interior determined that the conditions of the Act were not being "reasonably" complied with and carried out

by the grantee" and on or about August 24, 1935, notified the City that its disposal of electric energy generated at Hetch Hetchy was in violation of the provisions of the Act quoted in Finding IV. Finally, more than 18 months later and on March 30, 1937, the City stated that it would continue such disposal until after court action. Thereupon the said Secretary of the Interior, on April 2, 1937, in accordance with the provisions of the Raker Act, requested the Attorney General in the name of the United States to commence suit for the purpose of enforcing and [91] carrying out the provisions of that Act.

XIII.

The City is now selling or letting to the Company, the right to sell or sublet the electric energy generated at Hetch Hetchy and delivered by the City to it, and unless restrained will continue to so dispose of said power and to so sell or let to that Company the right to sell or sublet the electric energy delivered to it under the contract.

Conclusions of Law

From the foregoing Findings of *Act*, the Court reaches the following conclusions of law:

I.

The contract to sell, and the sale of, electric energy by the City to the Company for resale is a selling or letting to said Company of the right to resell the same, prohibited by and in violation of,

the provisions of the Raker Act, prohibiting such selling or letting.

II.

The contract between the City and Company is a grant by the City to the Company of the right to sell electricity produced by the City at Hetch Hetchy, and its performance by the parties is a selling or letting to said Company of the right to resell the same all within the prohibition of Section 6 of the Raker Act and hence a violation of that statute. [92]

III.

The provisions of Section 6 of the Raker Act are a part of a valid statute enacted by Congress in the exercise of its legislative power over public lands and having the force of law in its entirety. Enforcement of the express terms of the statute is not subject to estoppel or other equitable defense.

The motion of the United States to strike evidence of the City relating to these defenses must be granted and the motion of the City to reopen the case for the introduction of similar evidence must be denied.

IV.

The United States has no plain, speedy or adequate remedy at law.

V.

The United States is entitled to an injunction perpetually restraining the defendant, the City and County of San Francisco, from its present disposal

of said energy, or from any disposal thereof whereby the right to resell such energy is let or sold to any private corporation or individual and in default thereof enjoining and restraining the defendant from continuing to utilize the lands, rights and privileges granted by the Raker Act for the purpose of the generation of electric energy for such disposal.

Done in Open Court this ..... day of May, 1938.

.....

United States District Judge. [93]

Service of the above and receipt of copy thereof acknowledged this 18th day of May, 1938.

JNO. J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
of Counsel
Attorneys for Defendant

Approved as to Form this 18th day of May, 1938, as provided by Rule 22:

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Attorneys for Defendant.

[Endorsed]: Lodged May 19, 1938. [94]

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED AMENDMENTS AND ADDITIONS TO "FINDINGS OF FACT AND CONCLUSIONS OF LAW" PROPOSED BY PLAINTIFF AND SERVED MAY 19, 1938.

The defendant in the above entitled cause, (a) in accordance with Rule 42 of this Court, proposes each of the following amendments and additions to the "Findings of Fact and Conclusions of Law" in said cause proposed by plaintiff herein, and served upon said defendant on May 19, 1938, and (b) requests a hearing by the Court with respect to said proposed amendments and additions to said proposed Findings.

1. On page 2, line 30 of said proposed Findings, strike out the words: "And low rate electricity".

2. On page 3, line 2, after the words "its lands" insert the words: "therein described". [95]

3. On page 3, line 7 of said proposed Findings, after the word "generated", insert the following:

> "The location and extent of the lands and rights of way so granted to defendant under said Raker Act are correctly shown on 'Defendant's Exhibit A' in evidence herein".

4. On page 3, lines 15-16 of said proposed Findings, strike out the words: "and acquiesced in, and became bound by the terms and conditions thereof".

5. Page 3, lines 19 to 22, of said proposed Findings, strike out the words:

"To insure the direct distribution of water and electricity by the City to its inhabitants, and to prevent enjoyment by private corporations of any profits from the Government grant".

and commence the following word "it" with a capital.

6. On page 3, line 27 of said proposed Findings, after Finding "IV" insert the following:

"IV A

Among the provisions of said Raker Act were the following appearing in Section 9 thereof:

'(b) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated and which may be so beneficially used by said irrigation districts or municipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as

will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein: Provided, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage [96] or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(c) That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy as follows: The said grantee shall within three years from the date of completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the

works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further, said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file such maps, surveys, field notes, or other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(d) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale, such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interests demands or convenience requires; and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use and sale of [97] such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower: and for that purpose the Secretary of the Interior may take possession of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed by the grantee hereunder as may be necessary for the develop-

ment, transmission, use, and sale of such power.

(e) That the rates or charges to be made by the grantee or by any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior, allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee".

7. On page 4, line 1 of said proposed Findings, add the following:

"in connection with the utilization of lands, rights and privileges owned by the City and acquired by it from other sources".

8. On page 4, line 5 of said proposed Findings, after the word "United States" insert: "under the Raker Act".

9. On page 4, line 6 of said proposed Findings strike out the word "it", and in lieu thereof insert the words: "said project".

10. On page 4, lines 7 and 8 of said proposed Findings, insert the word "so" before the word "acquired" on line 8, and strike out the balance of the sentence.

11. On page 4, line 9 of said proposed Findings, insert a new paragraph to be numbered "VI A" which shall read as follows:

"VI A

In conformity with the provisions of said Raker Act, and prior to July 1, 1925, the defendant had expended over $43,000,000.00 in the construction of dams, aqueducts, and works, designed to store and deliver a municipal water supply to its inhabitants, had built the Early Intake power house, primarily for the supply of power for con- [98] struction purposes on the project, and had completed the Moccasin power house capable of generating 80,000 horsepower of hydroelectric energy, and a transmission line adequate to transmit said energy to Newark in Alameda County; the defendant had not acquired and never has been financially able to acquire any distribution system in the City and County of San Francisco or elsewhere for the distribution of such electric energy to consumers; the Company and Great Western Power Company (later consolidated with the Company) were at that time the only distributing companies owning electric distribution systems in San Francisco, and

each of them declined to sell or lease its distribution system to the defendant for the purpose of enabling it to distribute thereby to its inhabitants the electric energy generated by it in connection with its said Hetch Hetchy project."

12. On page 4, line 25 of said proposed Findings, after the words "United States", insert the following:

"in connection with lands, water rights, easements and privileges owned by the City and acquired by it from other sources,"

13. On page 4, line 28 of said proposed Findings, after the figures "1925" insert the following:

"There never has been and there is not any contract or arrangement between the City and the Company with respect to the delivery and/or distribution of said electric energy, other than said contract of July 1, 1925".

14. On page 4, line 29 of said proposed Findings, after the words: "Hetch Hetchy" insert the following:

"About 3 per cent. of the energy so generated and transmitted is produced in a power plant known as the Early Intake power plant, which is situate on lands granted to the City under the terms of said Raker Act; that the remaining 97 per cent. of said energy is generated in the Moccasin Creek power plant, which is situ-

ated entirely on patented land owned by the City, and that the electric energy generated therein, together with the surplus energy from the Early Intake plant, is transmitted from Moccasin power plant to Newark in Alameda County, over lands owned by the City and not acquired by it under the terms of the Raker Act; the only use made by the City of rights granted to it under the Raker Act in connection with said Moccasin Creek plant is the storage of water in the Hetch Hetchy Valley and at Lake Eleanor, partially on lands granted under the Raker Act, and the transmission of said water through tunnel aqueducts and canals partially on lands granted under the Raker Act; the primary purpose of said reservoirs and aqueducts is to transmit [99] water to San Francisco for municipal water supply purposes; said water would be so transmitted whether the Moccasin Creek power plant, which is on the line of the water conduit, were operated or not".

15. On page 5, strike out lines 3 and 4 of said proposed Findings, and in lieu thereof insert the following:

"In carrying out said contract of July 1, 1925, the City and the Company have proceeded as follows:"

16. On page 5, line 7 of said proposed Findings, insert before the word "Determination" the words:

"Subject to the provisions of said contract", and change the "D" in "Determination" to a small letter.

17. On page 5, line 14 of said proposed Findings, insert after the word "disposition", the words:

"but in a physical sense only and subject to the provisions of said contract of July 1, 1925".

18. On page 5, line 16 of said proposed Findings, strike out the words: "it is provided that from" and in lieu thereof insert the words:

"the parties to said contract deducted"

19. On page 5, lines 17 and 18 of said proposed Findings, strike out the words: "shall be deducted" and in lieu thereof insert the word: "thereof".

20. On page 5, lines 19 and 20 of said proposed Findings, strike out the words: "of receipt" which are repetitions.

21. On page 5, lines 21 to 25 of said proposed Findings, strike out the sentence commencing with the words: "Deduction of 24 per cent" and ending with the words: "for such energy".

22. On page 6, line 14 of said proposed Findings, strike out the words: "under the contract" and insert the word "exact" at the end of said line.

23. On page 6, line 16 of said proposed Findings, after the word "consumers" insert the following: [100]

"to the extent that payments made to the City are computed in accordance with the formula prescribed in said contract, and have not taken

into account changes made by the Railroad Commission of California in each of the years 1935, 1936 and 1937, in respect of the rates chargeable to consumers".

24. On page 6, between lines 16 and 17 of said proposed Findings, insert three new paragraphs to be numbered "3a", "3b" and "3c", which shall read as follows:

"3a. In and by said contract of July 1, 1925, it is provided that the rates at which the electric energy delivered by the City to the Company under said contract shall be sold to consumers in the City and County of San Francisco, shall be those fixed by the Railroad Commission of the State of California; said rates are the rates which at all times since July 1, 1925 have been and are now operative and binding upon the Company with respect to all electric energy generated by it which it sells in said City and County of San Francisco; said rates were adopted by the City and the Company in and by said contract of July 1, 1925, as the rates which should be charged to consumers of the electric energy generated by the City and delivered by it to the Company for transmission and distribution, as provided in said contract, for the reason that it would be impractical to charge consumers of electric energy generated by the Company at one rate, and to charge consumers of the electric energy generated by the City at a different rate;

3b. Since the execution of said contract of July 1, 1925, the City has received and is still receiving for the electric energy delivered by it to the Company the percentage of the average rate paid to the Company by consumers in the City and County of San Francisco, which in and by said contract it is provided that it shall receive; said average rate as fixed by said contract has remained constant, however, and has not been varied to conform to the rates fixed by the Railroad Commission of California in the years since the execution of said contract; as the result of the failure to vary said average rate of return to conform to the rates fixed by said Railroad Commission, the City has received from the Company $25,000.00 more than it would have received if said return had varied in conformity with the rates fixed by said Railroad Commission as by said contract it is provided that said return should vary;

3c. The net revenue to the City from the disposition and distribution of the electric energy generated by it, in accordance with the aforesaid contract of July 1, 1925, between the City and the Company, is and at all times has been approximately $2,200,000.00 per year."

25. On page 6, lines 25 to 28, inclusive, of said proposed Find- [101] ings, strike out the sentence commencing with the words: "The City is assured" and ending with the words: "its acceptance or use".

26. On page 6, lines 30 and 31 of said proposed

Findings, after the words: "are fixed", strike out the words: "not by the City but by the State Railroad Commission", and in lieu thereof insert the following:

"not by the Railroad Commission of California, but by the City, which, however, adopts the rates prescribed by said Railroad Commission of California, as the rates which may be charged by private utility corporations to consumers of electric energy".

27. On page 7, lines 4 to 6 of said proposed Findings, strike out all of the paragraph numbered 6 and in lieu thereof insert the following:

"6. Electric energy originating at Hetch Hetchy is distributed by the Company, in the normal course of its business, to the persons, firms and corporations who, are customers therefor at the time of distribution".

28. On page 7, lines 14 to 17 of said proposed Findings, strike out all of paragraph "9" and in lieu thereof insert the following:

"Except as next stated, the Company makes no accounting to the City of its sales of electricity to consumers. The amount of electricity delivered to the Company by the City at Newark is determined by joint meter readings at Newark, and the formulae specified in the contract of July 1, 1925, are applied to said quantity and the City merely bills the Company for said quantity in accordance with said formulae".

29. On page 7, lines 21 and 22 of said proposed Findings, strike out the words: "for sale of Hetch Hetchy power to the Company by the City", and in lieu thereof insert the following:

"of July 1, 1925. The power so purchased by the City from the Company, however, has different characteristics from that delivered by the City to the Company at Newark; after receiving the energy at Newark the Company steps down the voltage of said energy and regulates it through transformers and condensors; for municipal railway use, it converts a large part of the current from alternating current with a 60 cycle frequency [102] to direct current having no frequency, radically changes the load factor, and, by its standby service, protects the City's requirements for electric energy for the various purposes for which it is used by the City".

30. On page 7, line 25 of said proposed Findings, after the word: "cancellation" insert the words: "by the parties".

31. On page 7 of said proposed Findings, strike out all of paragraph "X" from the "Findings of Fact", because the subject matter thereof is not a finding of fact, but is a conclusion of law, and, as such, should be included in the "Conclusions of Law", if the subject matter is to be, at all, included in the "Findings of Fact and Conclusions of Law", in said cause.

32. On page 8 of said proposed Findings, strike out all of paragraph "XI" from the "Findings of Fact", because the subject matter thereof is not a finding of fact, but is a conclusion of law, and, as such, should be included in the "Conclusions of Law", if the subject matter thereof is to be, at all, included in the "Findings of Fact and Conclusions of Law", in said cause.

33. On page 8, line 16 of said proposed Findings, change the figure "XII" to "X".

34. On page 9 of said proposed Findings, strike out the figure "XIII" and all of the paragraph of that number, and in lieu thereof insert the following:

"XI.

Unless restrained by this Court, the City will continue to dispose of the electric energy generated by it at Hetch Hetchy in the manner hereinbefore stated".

35. On page 9, line 10 of said proposed Findings, insert four new paragraphs to be numbered: "XII", "XIII", "XIV" and "XV", which shall read, respectively, as follows: [103]

"XII.

The manner of disposition and distribution by the City of the electric energy generated by it in connection with its Hetch Hetchy project, in accordance with the aforesaid contract of July 1, 1925, ('United States Exhibit 6'), has not, at any time, damaged, and does not dam-

age, the plaintiff in any respect or to any extent or in any amount;

XIII.

If the City shall be prevented from disposing of the electric energy generated by it in connection with its Hetch Hetchy project, as provided in said contract of July 1, 1925 ('United States Exhibit 6'), or in some other manner by which it shall be permitted to use the transmission and distribution facilities of a private corporation for such purpose, it will suffer a loss of approximately $2,200,000.00 per year and will be damaged in that amount and to that extent.

XIV.

Any sudden disruption of operations under said contract of July 1, 1925, ('United States Exhibit 6') or any sudden cessation of the disposal and distribution of the electric energy generated by the City at its above mentioned power plants in connection with the so-called Hetch Hetchy water project, in the manner provided in said contract, would result in serious economic waste; for said reason, the City should be allowed a reasonable period within which to provide a mode of disposing of and distributing said electric energy, which will not violate the provisions of the Raker Act; a reasonable period to allow the City for said purpose is one year, to commence on the day when

the decree herein shall become final; the injunction to be issued herein should not be issued prior to the expiration of said period.

XV.

It is appropriate that the Court reserve jurisdiction of the cause for the purpose of modifying its Decree to be entered herein, so as to permit the City to transmit and distribute the electric energy generated by it in connection with its said Hetch Hetchy project, either by contract with a private corporation, or otherwise, in a manner which will not constitute a violation of the Raker Act".

36. On page 9, lines 18 to 22, inclusive, of said proposed Findings, strike out the first of the "Conclusions of Law" and in lieu thereof insert the following:

"The contract of July 1, 1925 is a contract to sell [94] for resale the electric energy generated by the City at Hetch Hetchy; said contract contemplates a sale of electric energy thereunder, includes a sale to the Company by the City of the right to resell the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark; said contract is prohibited by and is in violation of the provisions of the Raker Act prohibiting such sale".

37. On page 9, strike out the second of the "Conclusions of Law" and in lieu thereof insert the following:

"The contract between the City and the Company is a grant by the City to the Company of the right to sell the electric energy generated by the City at Hetch Hetchy and is a selling to the Company of the right to sell said electric energy in violation of the prohibition of Section 6 of the Raker Act".

38. On page 10, lines 9 to 12: Strike out the sentence within these lines commencing with the words: "The motion of the United States" and ending with the words: "must be denied", because the orders relating to the motions mentioned are intermediate orders, unrelated to the decision of the cases and have no place in the Findings of Fact or Conclusions of Law.

39. On page 10, line 19, before the words: "United States", insert the following:

"Subject to the provisions of the next succeeding paragraph 'VI' hereof,"

40. On page 10, line 28, insert the following:

"The United States is entitled to a decree which shall order, adjudge and decree as follows:

(1) That one (1) year after this Decree shall have become final, either through the lapse of the time limited for an appeal therefrom without any appeal having been taken, or through the affirmance by the Court, which shall have finally disposed of any appeal taken therefrom, the Clerk of this Court issue out of

this Court and under the seal thereof, a Writ of Injunction directed to the defendant and enjoining and restraining it from distributing or otherwise disposing of the electric energy generated by it at Moccasin Creek Power House and/or Early Intake Power House in connection or in conjunc- [105] tion with its so-called Hetch Hetchy Water project, in the manner provided in said contract of July 1, 1925, ('United States Exhibit 6'), and directing that unless it shall cease from distributing or otherwise disposing of said electric energy in the manner provided in said last mentioned contract, it be enjoined and restrained from using for the generation and transmission of said electric energy, any of the rights granted to it in and by the Statute of the United States, approved December 19, 1913 (38 Stats. at L. 241) commonly known as and called the Raker Act.

(2) That each of the parties hereto bear and pay its costs of suit herein.

(3) That the defendant shall have the right to submit to the Court at any time any plan, contract or arrangement for the transmission, distribution and disposal of the electric energy generated by it in connection with its Hetch Hetchy project which, in its opinion, does not constitute a violation of the provisions of said Raker Act, and to apply to the Court at the foot of the decree for a modification of said de-

cree and of the injunction thereby directed to issue, which will permit it to transmit, distribute and dispose of said electric energy in accordance with such plan, contract or arrangement, and the Court hereby retains jurisdiction of the cause for the purpose of entertaining such application, if any be made, and of granting the same if, upon the proof offered in support thereof, it shall seem proper so to do.''

By proposing the foregoing Amendments and Additions to said "Findings of Fact and Conclusions of Law" served May 19, 1938, as aforesaid, the defendant (1) does not concede or admit that the Findings of Fact and Conclusions of Law so proposed to be modified by said proposed amendments and additions, would be a proper Finding of Fact and/or Conclusion of Law to be made by this Court in said cause, if modified as proposed; (2) does not waive its right to object to any of said Findings of Fact and Conclusions of Law, as modified, if the proposed modification thereof, be allowed and adopted; and (3) does not concede, but, on the contrary, denies that any of the so-called Findings of Fact contained in paragraph IX of said proposed "Findings of Fact and Conclusions of Law", so served on May 19, 1938, or any of the other so-called Findings of Fact contained in said proposed "Findings of Fact and Conclusions of Law", so served May 19, 1938, [106] which purports to construe the meaning or effect of the aforesaid contract

between the City and the Company dated July 1, 1925, is a proper subject matter of a finding of fact.

Dated: June 1, 1938.

Respectfully submitted,
JNO. J. O'TOOLE
DION R. HOLM
Attorneys for Defendant.

ROBERT M. SEARLS
Of Counsel for Defendant.

Due service of the foregoing Amendments and Additions proposed by the defendant to the Draft of Findings of Fact and Conclusions of Law in the above cause, proposed by the Plaintiff, is hereby acknowledged this 1st day of June, 1938.

FRANK J. HENNESSY
W. E. LICKING
Attorneys for Plaintiff.

[Endorsed]: Lodged May 31, 1938. [107]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause came on regularly for trial in the above entitled court, Honorable Michael J. Roche, Judge of said court presiding, on October 19, 1937, the plaintiff United States of America being represented by its attorneys Frank J. Hennessy, United States Attorney for the Northern District

of California, W. E. Licking, Assistant United States Attorney, and Frederic L. Kirgis; the defendant City and County of San Francisco being represented by John J. O'Toole, City Attorney, Dion R. Holm, Assistant City Attorney, and Robert M. Searles; whereupon evidence both [108] oral and documentary on behalf of the parties was offered and received and the cause regularly continued to October 21, 1937, at which time leave was granted the parties to file briefs, and said briefs having been filed and the matter argued orally by the parties on March twenty-first and twenty-second, 1938, and the case having been submitted to the court for its decision on the latter date; the court having duly considered the evidence and the briefs and arguments of counsel and having on April 11th rendered its decision herein in favor of plaintiff together with its written opinion in support thereof, and being fully advised in the premises, now makes the following special findings of fact and reaches the following conclusions of law:

Findings of Fact.

I.

The defendant City and County of San Francisco, hereinafter referred to as the City, is a municipal corporation of the State of California. The Pacific Gas & Electric Company, hereinafter referred to as the Company, is a private California corporation, engaged in the business of distribution and sale of

electric energy in the City and County of San Francisco and elsewhere.

II.

For a number of years prior to December 19, 1913, the City had been seeking to assure itself of adequate water by a plan known as the Hetch Hetchy project. By the terms of the Raker Act of December 19, 1913 (38 Stat. 242) the United States, acting through the Congress granted to the City lands and certain rights and privileges in its lands therein described; among the rights and privileges so granted was [109] the right to utilize the granted lands and their appurtenant resources for the development of electric energy, including the storage and transmission of water necessary for the generation of electric energy and the transmission of electricity generated.

The grant so made by the United States was conditional upon the acceptance by the City of the terms and conditions therein specified.

III.

Thereafter, the City of San Francisco, through an ordinance passed by its Board of Supervisors and approved by its Mayor, January 13, 1914, did accept said grants contained in the Raker Act and acquiesce in the terms and conditions thereof.

IV.

To insure the direct distribution of water and electricity by the City, and to prevent enjoyment

by private corporations of any profits from the Government grant, it was provided in the Raker Act:

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it by the said grantee."

V.

Prior to July 1, 1925 the City had entered into the use and enjoyment of the lands, rights and privileges granted by the Raker Act and was then, and is now, generating and [110] transmitting electric energy through its utilization thereof.

VI.

The lands and rights acquired by the City from the United States under the Raker Act are indispensable to the operation of the City's Hetch Hetchy project, although said project includes lands and rights other than those so acquired from the United States.

VII.

On July 1, 1925 the City entered into a contract with the Company for the distribution and sale of electric energy generated by the City at its Moccasin Creek Power Plant, part of the so-called Hetch Hetchy project. A true and correct copy of the contract is filed with the City's answer, marked

"Exhibit A" thereof, and is made a part of this finding by reference.

VIII.

Since July 1, 1925, electric energy originating at the Moccasin Creek Power Plant of the City, and since late in 1935, the electric energy originating at the City's Early Intake plant, all generated and transmitted through utilization of the lands, rights and privileges granted to the City by the United States, has been, and is now being delivered to the Company under the terms of the contract executed between the City and the Company on July 1, 1925. Electric energy generated at both plants is hereinafter referred to as that originating at Hetch Hetchy. [111]

IX.

Under the contract, by its terms, and as shown by the activities of the contracting parties thereunder:

1. Power developed by the City at Hetch Hetchy is delivered to the Company at its Newark substation, 35 miles south east of San Francisco. Determination of how much electricity shall be accepted at any given time is made by the load dispatcher of the Company, the Company's dispatcher actually giving the orders which control the operation and output of the City's plants. From the time electric energy originating at Hetch Hetchy enters the system of the Company at Newark the City is without power over, and the Company has exclusive and entire control of, its disposition.

2. In determining the amount which should be paid to the City, it is provided that from the amount of energy delivered to the Company at Newark, 24 per cent shall be deducted as representing the amount of transmission, sub-station and distribution loss between time of receipt of the energy from the City by the Company at Newark and delivery to the ultimate consumers. Deduction of 24 per cent of the Hetch Hetchy energy delivered by the City to the Company at Newark is a necessary factor in the formula for ascertainment of the amount to be paid by the Company to the City as a fair price for such energy.

3. By the terms of the contract the Company is required to "account for and pay over to the City for the energy so consigned and delivered to it by the City at Newark for transmission and distribution to consumers as provided in this contract 26.935 per cent of 2.383 cents per kilowatt hour, (the average revenue received by the Company in 1924) for 76 per cent of the energy so consigned [112] and delivered by the City to it at Newark. And the Company shall retain * * * 73.065 per cent as its compensation for services rendered under this contract." The proportional percentages—26.935 and 73.065—were to remain fixed during the life of the contract between the City and the Company. As rates varied, amounts of payments to the City were to be adjusted accordingly.

In actual practice the amount per unit received by the City for its electric energy delivered under

the contract has remained constant, despite several reductions in the rates charged by the Company and appreciable fluctuation in the average amount per unit received by the Company from its sale. The price which the City receives for its energy under the contract is in practice fixed and without direct relation to the actual revenue received from its sale to consumers.

4. With exceptions here immaterial the Company accepts at Newark the entire output of energy from Hetch Hetchy at not to exceed a 75 per cent monthly load factor. Monthly payments by the Company to the City are based upon the amount of energy actually delivered into the Company's system at Newark, or, in event of failure of the Company to take the available output of the City's plant deliverable at Newark under the contract, upon the amount which the City could have delivered at a 75 per cent load factor. The City is assured of payment and the Company is under an absolute duty to pay for the amount of electric energy specified without regard to its acceptance or use.

5. The rates charged to consumers of electric energy originating at Hetch Hetchy are fixed not by the City but by the State Railroad Commission. Under the State Constitution, municipalities are not subject to commission regula- [113] tion, and as a principal the City has power thereunder to fix rates for electric energy produced by it, and sold by an agent, if there be an agent.

6. Electric energy originating at Hetch Hetchy

is disposed of by the Company to its usual customers in the normal course of its retail trade.

7. The Company is the sole creditor named in the statements of account furnished by it to purchasers of electric energy including that originating at Hetch Hetchy.

8. Moneys collected by the Company from consumers of power are in no way, arbitrarily or otherwise, segregated or apportioned with regard to the portion thereof deemed attributable to power produced at Hetch Hetchy.

9. To the City the Company makes no accounting of its sales of electricity to consumers. Accounting between the two is limited to monthly statements by the City to the Company for electricity delivered at Newark.

10. The City is itself a purchaser from the Company of power, part of which originates at Hetch Hetchy, and on terms which have no relation to those specified in the contract for sale of Hetch Hetchy power to the Company by the City.

11. The contract is terminable by either the City or the Company upon one day's notice; and is by its terms subject to cancellation by the parties upon request of the Secretary of the Interior should he determine the agreement to be violative of any section of the Raker Act.

X.

The contract between the City and the Company is a contract to sell for resale, and the disposal of electric [114] energy thereunder by the City to

the Company constitutes a sale for resale of, electric energy generated by the City at Hetch Hetchy. The contract to sell contemplates, and the sale of energy thereunder includes, a sale and letting to the Company of the right to resell or sublet the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark

XI.

The Secretary of the Interior is designated by the Raker Act to safeguard the interest of the United States in its grant. Pursuant to such duty imposed by the Act, the Secretary of the Interior determined that the conditions of the Act were not being "reasonably complied with and carried out by the grantee" and on or about August 24, 1935, notified the City that its disposal of electric energy generated at Hetch Hetchy was in violation of the provisions of the Act quoted in Finding IV. Finally, more than eighteen months later and on March 30, 1937, the City stated that it would continue such disposal until after court action. Thereupon the said Secretary of the Interior, on April 2, 1937, in accordance with the provisions of the Raker Act, requested the Attorney General in the name of the United States to commence suit for the purpose of enforcing and carrying out the provisions of that Act.

XII.

The City is now selling or letting to the Company, the right to sell or sublet the electric energy gen-

erated [115] at Hetch Hetchy and delivered by the City to it, and unless restrained will continue to so dispose of said power and to so sell or let to that Company the right to sell or sublet the electric energy delivered to it under the contract.

Conclusions of Law.

From the foregoing Findings of Fact, the Court reaches the following conclusions of law:

I.

The hereinbefore described disposal by the City to the Company of electric energy includes a selling and letting by the City to the Company of the right to sell or sublet such energy and is within the prohibition of Section Six of the Raker Act; and any disposal of such energy by the City whereby the right to sell or sublet the same is sold or let to any individual or corporation except a municipality or a municipal water district or irrigation district will likewise violate such provision.

II.

The provisions of Section 6 of the Raker Act are a part of a valid statute enacted by Congress in the exercise of its legislative power over public lands and having the force of law in its entirety. Enforcement of the express terms of the statute is not subject to estoppel or other equitable defense. [116]

III.

The United States has no plain, speedy or adequate remedy at law.

IV.

The United States is entitled to an injunction effective six months from the entry of the Decree herein perpetually restraining the defendant, the City and County of San Francisco, from its present disposal of said energy, or from any disposal thereof whereby the right to resell such energy is let or sold to any private corporation or individual, and in default thereof enjoining and restraining the defendant from continuing to utilize the lands, rights and privileges granted by the Raker Act for the purpose of the generation of electric energy for such disposal.

V.

That it is appropriate that this court reserve and retain jurisdiction of this cause for the purpose of permitting either party, upon proper notice and on such proof as the Court may require, to apply to the Court at the foot of the Decree for a modification or suspension of the provisions of the injunction issued pursuant to said Decree.

Done in Open Court this 24th day of June, 1938.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed: Filed June 24, 1938.] [117]

In the Southern Division of the United States District Court for the Northern District of California.

In Equity No. 4173-R.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,

Defendant.

FINAL DECREE AND ORDER FOR WRIT OF INJUNCTION.

This cause came on to be further considered at this term and was briefed and argued by counsel for the respective parties and thereupon on consideration thereof it is this day hereby

Ordered, Adjudged and Decreed as follows, viz:

(1) That the defendant's present disposal to the Pacific Gas and Electric Company of the electric energy generated and transmitted by the defendant through its utilization of the lands, rights and privileges granted it by the plaintiff through the terms of the Raker Act (38 Stats. at Large 242) is a violation of the provisions of Section 6 of that Act prohibiting the sale [118] or letting of the right to sell such energy, and that any disposal by the defendant of said energy whereby the right to

sell or sublet the same is sold or sublet to any private corporation or individual will likewise violate the same provision; and

(2) On and after December 28th, 1938, the defendant, the City and County of San Francisco, its officers, agents, servants and employees, and their successors and other persons assuming to act under its authority, be, and they are hereby enjoined from the disposal of such electric energy to the Pacific Gas and Electric Company pursuant to the terms of the contract between defendant and said Company dated July 1, 1925, or in the manner therein provided, and from any disposal thereof whereby there is sold, given, let to, or otherwise vested in the Pacific Gas and Electric Company or any individual or corporation, other than a municipality or municipal water district or irrigation district, the right to sell or sublet such electric energy; and

(3) If defendant shall fail to comply with Paragraph (2) of this decree, it shall be and hereby is enjoined and restrained from using for development and transmission of electric energy any of the lands, rights and privileges granted to it by plaintiff by the said Raker Act.

(4) The Court hereby reserves and retains jurisdiction of this cause for the purpose of permitting either party, upon due notice and such proof as the court may require, to apply to the court at the foot of the decree for a modification or suspension of the injunction hereinabove ordered. [119]

It Is Further Adjudged and Decreed that each party bear its own costs.

Dated: This 28th day of June, 1938.

MICHAEL J. ROCHE
United States District Judge.

Service of the above and receipt of copy thereof acknowledged this 24th day of June 1938.

JNO. J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant.

Approved as to form this 24th day of June 1938, as provided by Rule 22:

JNO. J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant.
FRANK J. HENNESSY
United States Attorney.
W. E. LICKING
Assistant United States Attorney.
Attorneys for Plaintiff.

[Endorsed]: Filed and Entered June 28, 1938.

[120]

[Title of District Court and Cause.]

PETITION OF DEFENDANT FOR REHEARING.

To the Honorable, the Above Entitled Court:

The defendant in the above entitled cause hereby respectfully prays for a rehearing of said cause,

and represents and urges the following, in support of its said prayer and as the grounds for justifying and requiring the granting of the same:

1. That the evidence in said cause was and is insufficient to justify any of the findings of fact adverse to the defendant which are included in the Opinion of the Court filed herein April 11, 1938;

2. That the evidence in said cause was and is insufficient to justify any of the conclusions of law adverse to said defendant which are included in the Opinion of the Court filed herein April 11, 1938;

[121]

3. That the evidence in said cause was and is insufficient to justify any of the findings of fact adverse to the defendant which are included in the "Findings of Fact and Conclusions of Law" made, signed and filed in said cause on June 24, 1938;

4. That the evidence in said cause was and is insufficient to justify any of the Conclusions of Law adverse to the defendant which are included in the "Findings of Fact and Conclusions of Law" made, signed and filed in said cause on June 24, 1938;

5. That the evidence in said cause was and is insufficient to justify the decree made, filed and entered in said cause, on June 28th, 1938;

6. That the Court erred in each of its rulings on the admission of evidence, on the hearing of said cause, to which the defendant duly excepted, as shown by the Reporter's Transcript of the evidence offered and received and the proceedings had and taken on said hearing; said Reporter's Transcript is, by reference, incorporated herein, and made a part hereof;

7. That the Court erred in its rulings on the hearing of said cause and in its Opinion and its Findings of Fact and Conclusions of Law therein by which it held and decided that the provisions of Section 6 of the Raker Act were adopted by the Congress of the United States as part of a valid statute and in the exercise of the legislative power of the Congress over public lands of the United States, and that said provisions have the force and effect of law and not merely of covenants or contract restrictions upon the use of property;

8. That the Court erred in its rulings on the hearing of said cause and in its Opinion and its Findings of Fact and Conclusions of Law therein by which it held and decided that the right of the United States to enforce the provisions of Section 6 of the Raker Act was not dependent upon or subject to any rule of estoppel or any other equit- [122] able defense.

9. That the Court erred in its rulings on the hearing of said cause and in its Opinion and its Findings of Fact and Conclusions of Law therein whereby it held and decided that the determination of the question whether the United States was entitled to an injunction in said cause because of the alleged violation by the defendant of the provisions of Section 6 of the Raker Act was not dependent upon and could not be influenced by any consideration of the relative equities of the respective parties, and that, in the determination of said question, no consideration should be given as to whether or not

the equities of the defendant outweighed and outbalanced the equities of the plaintiff;

10. That the Court erred in its rulings made in its Opinion filed April 11, 1938, by which it granted the plaintiff's motion to strike out certain evidence offered by the defendant upon the hearing of the cause, and then admitted; the evidence so stricken out is shown by the Reporter's Transcript of the Evidence offered and received and the proceedings had and taken on said hearing which, by reference, is incorporated herein, and made a part hereof;

11. That the Court erred in the ruling made in its Opinion filed April 11, 1938, by which it denied defendant's motion to set aside the submission of said cause and permit the defendant to offer additional evidence therein;

12. That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, and in its Decree, that Section 6 of the so-called Raker Act (38 Stats. 241) prohibits the distribution and/or disposal, in the manner provided in the agreement dated July 1, 1925 ("Exhibit A" to the defendant's answer herein) between the defendant and Pacific Gas & Electric Company (hereinafter called the "Company"), of the electric energy gen- [123] erated and/or transmitted wholly or partly by or through the exercise of rights or privileges granted to the defendant by said Raker Act;

13. That the Court erred in holding and deciding in its Opinion in said cause and in its Find-

ings of Fact and Conclusions of Law therein, and in its Decree, that said agreement dated July 1, 1925 is not a contract of agency, and that, in rendering the services which it renders, under and in accordance with said agreement, the Company does not act as agent for the defendant and/or for its account;

14. That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, and in its Decree, that said agreement of July 1, 1925, is a contract for the sale to the Company, for resale by it to ultimate consumers, of the electric energy which is the subject matter of said agreement;

15. That the Court erred in holding and deciding in its Opinion in said cause, and in its Findings of Fact and Conclusions of Law therein, and in its Decree, that said agreement of July 1, 1925, is a contract whereby the defendant sells or lets to the Company the right to resell or sublet the electric energy which is the subject matter of said agreement;

16(a). That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that said agreement of July 1, 1925, vests in the load dispatcher of the Pacific Gas and Electric Company the right to determine how much electricity shall be accepted at any given time under said contract, and that from the time the electric energy originating at Hetch Hetchy enters the system of the Com-

pany at Newark the City is without any power over its disposition;

16(b). That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law [124] therein, that the deduction of 24 per cent. of the Hetch Hetchy electric energy delivered by the City to the Pacific Gas and Electric Company at Newark under said contract of July 1, 1925, is only a necessary factor in the formula for ascertainment of a purchase price for such energy, and in failing to find that said percentage in fact represents the actual line losses incurred by the Pacific Gas and Electric Company in transmitting the said Hetch Hetchy energy from Newark to the consumers in San Francisco;

16(c). That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that 73.065 per cent. of 2.383 cents per kilowatt hour which the Pacific Gas and Electric Company under said contract of July 1, 1925, is entitled to retain as its compensation for services rendered under this contract, is purely a percentage fixed by contract, and the Court erred in failing to hold that said 73.065 per cent. of 2.383 cents per kilowatt hour did not represent the actual expense of said Company incurred in distributing said electric energy at the time said contract was made, including a fair compensation for the use of the Company's distribution system in making such distribution.

The Court further erred in failing to hold that during the past ten years the total amount of money realized and received by the defendant under said contract of July 1, 1925, exceeded the amount which it would have received if the average return of the Pacific Gas and Electric Company for the sale of said energy under every change in rates which took place was not in excess of $25,000 out of a total compensation received by the defendant of over $22,000,000, and that said difference therefore constituted an immaterial departure from the strict terms of the contract;

16(d). That the Court erred in not holding that the entire output of electric energy from Hetch Hetchy delivered at San Francisco on a [125] 75 per cent. monthly load factor is less than the total amount of electric energy necessary each month in San Francisco to meet the consumptive demand in said City and County for electric energy, and in not holding and finding that a market existed in the City and County of San Francisco for all of the electric energy which the defendant was able to deliver from Hetch Hetchy, and that hence the obligation of the Pacific Gas and Electric Company to take delivery of and distribute said total output from defendant's plants on a 75 per cent. monthly load factor did not constitute an obligation to take any energy for which a ready market in San Francisco did not in fact exist;

16(e). That the Court erred in holding and deciding in its Opinion in said cause and in its Find-

ings of Fact and Conclusions of Law therein, that the rates charged to the consumers of electric energy originating at Hetch Hetchy are not fixed by the City, and in failing to hold that under the terms of said contract the City expressly required that the said electric energy be sold at rates to be fixed by the State Railroad Commission, and that the City had a right to make such a requirement under the laws of the State of California and exercise the same;

16(f). That the Court erred in failing to hold and decide in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that the usual customers of the Pacific Gas and Electric Company to whom said electric energy originated at Hetch Hetchy was disposed of by said Company were not also in fact the customers of the defendant by reason of the terms of said contract of July 1, 1925;

16(g). That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that the fact that the Pacific Gas and Electric Company is the sole creditor named in the statements of account furnished by it to purchasers of electric energy, including that originating at Hetch Het-
[126] chy, and that moneys collected by the Company from consumers were not segregated in its accounts so as to show the portion thereof deemed attributable to power produced at Hetch Hetchy, was of any significance in determining the character

of said contract of July 1, 1925, as an agency contract or a sales contract;

16(h). That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that the fact that the monthly accounting between the defendant and the Pacific Gas and Electric Company was limited to monthly statements by the defendant to said Company for electricity delivered at Newark, is of any significance in determining the character of said contract of July 1, 1925, as an agency contract or a sales contract;

16(j). That the Court erred in failing to hold or decide in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, that although the City itself is a purchaser from the Company of power, part of which originates at Hetch Hetchy, the characteristics of electric energy delivered to the City by the Company in San Francisco, both as to voltage, frequency and other characteristics, are radically different from the corresponding characteristics of said electric energy when delivered to the said Company by the City at Newark, and that therefore a separate accounting for such energy delivered to the City by the Company in San Francisco was and is necessary;

17. That the Court erred in holding and deciding in its Opinion in said cause and in its Findings of Fact and Conclusions of Law therein, and decreeing in its Decree, that the defendant should be enjoined from further transmitting, distributing

and disposing in the manner provided in said agreement of July 1, 1925, between it and the Company, of the electric energy generated by the defendant;

18. That the Court erred in holding and deciding (in effect), in [127] its Opinion in said cause, and in its Findings of Fact and Conclusions of Law therein, and in its Decree, that the provisions of Section 6 of said Raker Act are conditions subsequent, a violation of which by the grantee (defendant herein), entails or justifies a forfeiture of the rights and privileges granted the defendant by said Raker Act;

19. That the Court erred in holding and deciding in its Opinion in said cause, and in its Findings of Fact and Conclusions of Law therein and in decreeing in its Decree that unless the City desisted from distributing and disposing, in accordance with said agreement of July 1, 1925, between it and the Company, of the electric energy generated by the City, it should be enjoined from using any of the rights and privileges granted to it by the Raker Act, in making distribution and disposal of said electric energy, in accordance with said agreement;

20. That the Court erred in holding and deciding in its Opinion, in said cause, and in its Findings of Fact and Conclusions of Law and in its Decree, and decreeing in its Decree, that injunctive relief should be awarded to the plaintiff, notwithstanding, that it has not suffered and will not suffer any damage whatsoever from the alleged violations of the provisions of the Raker Act claimed to have been

committed by the defendant, and notwithstanding that the defendant, through the operation of such injunction, will suffer damages in an amount exceeding $2,200,000.00 per year, so long as said injunction shall be and remain in force;

21. That the Court erred in holding and deciding in its Opinion in said cause, and in its Findings of Fact and Conclusions of Law, therein, and in decreeing in its Decree, that the injunctive relief ordered by it should be withheld for not more than six months after the date of its decree, and in denying defendant's request that it provide in its decree that an injunction should not issue until one year after the decree should become final. [128]

22. That the Court erred in failing and refusing to find that the prohibitions of Section 6 of the Raker Act were merely provisions in a contract between the plaintiff and the defendant, and as such were invalid and or unenforceable;

23. That the Court erred in failing and refusing to find that the prohibitions of Section 6 of the Raker Act were not within the law-making power of the Congress and that considered other than as provisions in a contract between the plaintiff and the defendant, the imposition of such prohibitions by the Congress would have been an unconstitutional invasion of the rights of the State of California, and of the defendant, City and County of San Francisco;

24. That the Court erred in failing and refusing to find that the prohibitions of Section 6 of the

Raker Act considered as provisions in a contract between the defendant and the plaintiff, were and are invalid and unenforceable because they imposed an unreasonable restraint of trade and an unreasonable restriction upon the power of alienation, particularly in so far as said restraint and restriction were imposed upon a public use;

25. That the Court erred in failing and refusing to find that the defendant had no authority to enter into a contract with the United States whereby it would limit its freedom in trading in or disposing of the electric energy generated by it in connection with its Hetch Hetchy project, and in failing and refusing to find that when the Raker Act was passed and the contract between the plaintiff and the defendant was made, the United States had notice of the City's lack of authority to enter into a contract which contained such prohibitions;

26. That the Court erred in failing and refusing to find that the invalidity of the prohibitions of Section 6 of the Raker Act would not and did not derogate from the grant made to the defendant by the Raker Act, or affect the rights and/or privileges granted to the def- [129] endant by said Act;

27. That the Court erred in failing and refusing to find that the prohibitions of Section 6 of the Raker Act were inserted for the benefit of the defendant and not for the benefit of the plaintiff, and that the plaintiff cannot rely upon or claim the benefit of such provisions, and is not entitled to enforce them by injunction;

28. That the Court erred in failing and refusing

to find that an injunction was not necessary for the protection of the plaintiff herein, and in failing and refusing to find that no benefit can accrue to the plaintiff from the issuance or the enforcement of an injunction;

29. That the Court erred in failing and refusing to find that the plaintiff would suffer no damage or injury from the denial of an injunction herein, and in failing and refusing to find that the defendant would suffer great damage and injury from the granting of an injunction.

Wherefore, for the reasons aforesaid, defendant prays that the Court require the plaintiff herein to answer this petition and to show cause why it should not be granted; that upon the hearing of this petition, the Court grant the same and order a rehearing of said cause; and that it grant to the defendant such other relief as may be proper and in accordance with the rules and usages of equity.

Dated: July 7th, 1938.

THE CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,
defendant herein.

By JNO. J. O'TOOLE,
By DION R. HOLM,
By ROBERT M. SEARLS,
Its Attorneys.

JNO. J. O'TOOLE,
DION R. HOLM,
ROBERT M. SEARLS,
Attorneys for Defendant. [130]

State of California,
City and County of San Francisco.—ss.

John J. O'Toole, being first duly sworn, deposes as follows:

I am the City Attorney of the City and County of San Francisco, a municipal corporation, which is the defendant in the above entitled cause and the petitioner herein, and am one of the attorneys for said defendant and petitioner, and, as such, verify the foregoing petition on behalf of said defendant and petitioner. I have read said petition and know the contents thereof. Said petition is made and filed in good faith, and, in my opinion, the grounds upon which it is made are true in point of fact, and well taken in point of law.

JNO. J. O'TOOLE.

Subscribed and sworn to before me this 7th day of July, 1938.

J. L. PERUSIO,
Deputy County Clerk and Ex-Officio Deputy Clerk of the Superior Court of the State of California.

Rec'd copy of the foregoing petition this 8th day of July, 1938.

FRANK J. HENNESSY,
United States Atty.

[Endorsed]: Filed July 8, 1938. [131]

[Title of District Court and Cause.]

ORDER.

The defendant in the above entitled cause having this day filed herein its verified petition for rehearing of said cause, it is hereby ordered

1. That said petition be and the same is hereby entertained by the Court and reserved for further consideration and disposition at the hearing thereof, for which provision is hereinafter made;

2. That a copy of said petition and of this order be served upon the attorneys for the plaintiff in this cause within two (2) days from the date hereof; that (in accordance with Rule 44 of this Court) the plaintiff have (and it is hereby granted), ten (10) days from and after the service of said petition upon its attorneys within [132] which to serve and file its reply thereto; and that after the service and filing of plaintiff's reply to said petition, either party may call up said petition for hearing by the Court, upon not less than five (5) days' written notice to the other party;

3. That (in accordance with Rule 8 of this Court) the present term of this Court be and it is hereby extended for a period of three (3) calendar months commencing on June 28th, 1938 (said date being the date upon which the decree, herein, was entered), for the purpose of enabling the Court to hear, consider and pass upon said petition for rehearing.

Done in open Court this 8th day of July, 1938.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed July 8, 1938. [133]

[Title of District Court and Cause.]

NOTICE OF HEARING OF PETITION.

To the defendant above named, and to John J. O'Toole, Dion R. Holm, and Robert M. Searls, Esq., its attorneys:

You and each of you are hereby notified that on Monday, July 18, 1938, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of the above entitled Court, the undersigned as attorneys for the above named plaintiff will bring on for hearing the "Petition of Defendant for Rehearing," filed herein on July 7, 1938, together with the annexed Reply of Plaintiff thereto filed this date.

Dated: This 11th day of July, 1938.

FRANK J. HENNESSY,
United States Attorney

W. E. LICKING,
Assistant United States Attorney,
Attorneys for Plaintiff.

FREDERIC L. KURGIS
Of Counsel. [134]

[Title of District Court and Cause.]

REPLY TO PETITION FOR REHEARING.

Plaintiff in the above cause in reply to defendant's petition for rehearing on file herein respectfully urges the following grounds justifying and requiring a denial of the same:

I.

That the various specifications of error urged in support of said petition are, and each of them is, erroneous and ill-taken.

II.

That the matters of evidence now urged in support of said specifications were and each of them was fully presented to the Court at the trial of said cause. [135]

III.

That the points of law raised by said specifications were, and each of them was, urged and argued by defendant at the trial of said cause and were, and each of them was, duly considered by the Court and decided adversely to defendant's contentions.

Wherefore, for the reasons aforesaid plaintiff prays that the Court deny said petition.

Respectfully submitted this 11th day of July, 1928.

FRANK J. HENNESSY
United States Attorney
W. E. LICKING
Assistant United States Attorney
FREDERIC L. KURGIS.
Of Counsel
Attorneys for Plaintiff.

Service of the above and receipt of copy thereof acknowledged this 11th day of July, 1938.

JNO. J. O'TOOLE,
DION R. HOLM,
ROBERT SEARLS,
Attorneys for Defendant.

Approved as to form this.....day of July, 1938, as provided by Rule 22:

.....
Attorneys for Defendant.

.....
Frank J. Hennessy,
United States Attorney.

.....
W. E. Licking,
Assistant United States Attorney.

.....
Frederic L. Kurgis,
Of Counsel.
Attorneys for Plaintiff.

[Endorsed]: Filed July 11, 1938. [136]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 26th day of July, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: the Honorable Michael J. Roche, District Judge.

[Title of Cause.]

Defendant's petition for rehearing came on to be heard. J. J. O'Toole and Robert M. Searls, Esqrs., appearing as attorneys for defendant and in support of said petition and Frank J. Hennessy, Esq., United States Attorney and Wm. E. Licking, Assistant United States Attorney, appearing on behalf of the plaintiff and in opposition thereto. After argument, it is Ordered that said petition for rehearing be and the same is hereby denied and that the defendant be allowed an exception to the ruling of the Court. [137]

[Title of District Court and Cause.]

ORDER ALLOWING TIME FOR FILING STATEMENT OF EVIDENCE.

Upon petition of defendant herein, It Is Hereby Ordered that it be allowed thirty (30) days from date hereof in which to prepare and lodge with the Clerk of the Court the statement of evidence required by Equity Rule No. 75 for use on appeal in the above entitled matter.

Dated: October 17, 1938.

A. F. ST. SURE,

District Judge.

[Endorsed]: Filed Oct. 17, 1938. [138]

[Title of District Court and Cause.]

STATEMENT OF EVIDENCE.

The above entitled cause came on for final hearing before the above entitled Court, Hon. Michael J. Roche, presiding, on October 19, 1937. Frank J. Hennessy, Esq., United States District Attorney, William E. Licking, Esq., Assistant United States District Attorney, and Frederic L. Kirgis, Esq., First Assistant Solicitor of the Department of the Interior, appearing on behalf of the plaintiff; John J. O'Toole, Esq., City Attorney of San Francisco; Dion R. Holm, Esq., Assistant City Attorney, and Robert M. Searls, Esq., appeared on behalf of the defendant.

At the commencement of the hearing, Mr. Hennessy, counsel for the plaintiff, made an opening statement on behalf of the plaintiff, in the course of which, among other things, he said:

> "I have been authorized to state to the Court that the Government is not seeking in this case and will not offer any evidence upon the subject of damages; neither will we seek an accounting of the City and County of San Francisco of any profits that the City and County may have made through the diversion of the electric energy generated on the Hetch Hetchy project.
>
> The issue is a simple one. The question is, has the City and County of San Francisco violated the provisions of Section 6 of the Raker

Act. If the evidence shows a violation by the City and County of San Francisco of the provisions of Section 6 of the Raker Act, [139] the Government asks this Court to make a finding that this contract entered into on July 1, 1925 between the City and County of San Francisco and Pacific Gas & Electric Company is a contract of sale, and is violative of the provisions of Section 6 of the Raker Act, and enjoining the City and County of San Francisco from continuing to sell power for purposes of resale pursuant to the terms of that contract to the Pacific Gas & Electric Company, or to anybody else.

* * * * * * *

We are not seeking a forfeiture of the grant contained in the Raker Act. We are simply seeking an injunction restraining the violation by the City and County of San Francisco of Covenant 6 contained in the Raker Act.

* * * * * * *

On July 1, 1925 the City and County of San Francisco entered into a written contract with the Pacific Gas & Electric Company. This contract is designated a contract of agency. It purports ostensibly to employ the Pacific Gas & Electric Company to distribute the power developed from the Hetch Hetchy project by the City and County of San Francisco to consumers as the agent of the City and County of San

Francisco. It is the contention of the Government in this case that looking beyond the words 'agency' and 'consignment,' and at the substantial provisions of the contract, that this contract is not a contract of consignment, and is not a contract of agency, but is a contract for the sale of the electric energy developed by the City and County of San Francisco, largely as a result of a grant of public lands by the United States, to the Pacific Gas & Electric Company for the purpose of re-sale, and that the sale of this energy to the Pacific Gas & Electric Company for the purpose of resale is violative of the provisions of Section 6 of the Raker Act.

It is the contention of the Government in this case that Congress has clearly manifested in the Raker Act its intention to preserve for the People the electric energy developed as the result of grants of the public domain; that it was the intention of Congress, in making this grant to the City and County of San Francisco, that this electric energy should be used for the benefit of the people and should not be permitted to pass into the hands of private corporations to be by them sold back to the people at a profit to the private corporation or the private individual. Briefly, that is the issue in this case: Is this contract entered into by the City and County of San Francisco on July 1, 1925, a contract of agency, a contract merely by

which the City and County of San Francisco consigns to the Pacific Gas & Electric Company as its agent certain power for distribution, or is it a sale of power by the City and County of San Francisco to the Pacific Gas & [140] Electric Company for a definite sum to be paid monthly and thereafter sold by the Pacific Gas & Electric Company to its consumers under a contract entered into in the name of the Pacific Gas & Electric Company"?

The opening statement on behalf of the plaintiff having been concluded, counsel for the plaintiff, for the convenience of the Court, offered in evidence a copy of the Raker Act (38 Stat. 241) of which he stated judicial notice would be taken by the Court. Said copy of said Act was received in evidence, and marked

"U. S. EXHIBIT 1".

It reads as follows:

"An Act granting to the City and County of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest and the public lands in the State of California, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby granted to the City and County of San Francisco, a municipal cor-

poration in the State of California, all necessary rights of way along such locations and of such width, not to exceed two hundred and fifty feet, as in the judgment of the Secretary of the Interior may be required for the purposes of this Act, in, over and through the public lands of the United States in the counties of Tuolumne, Stanislaus, San Joaquin and Alameda, in the State of California, and in, over and through the Yosemite National Park and the Stanislaus National Forest, or portions thereof, lying within the said counties, for the purpose of constructing, operating and maintaining aqueducts, canals, ditches, pipes, pipe lines, flumes, tunnels and conduits for conveying water for domestic purposes and uses to the City and County of San Francisco and such other municipalities and water districts as, with the consent of the City and County of San Francisco, or in accordance with the laws of the State of California in force at the time application is made, may hereafter participate in the beneficial use of the rights and privileges granted by this Act; for the purpose of constructing, operating and maintaining power and electric plants, poles and lines for generation and sale and distribution of electric energy; also for the purpose of constructing, operating and maintaining telephone and telegraph lines, and for the purpose of constructing, operating and maintaining roads, trails, bridges, tramways, railroads and other means of locomotion, transportation and communication, such as may be necessary or proper in the construction, maintenance and operation of the works con-

structed by the grantee herein; together with such lands in the Hetch Hetchy Valley and Lake Eleanor Basin within the Yosemite National Park, and the Cherry Valley [141] within the Stanislaus National Forest, irrespective of the width or extent of said lands, as may be determined by the Secretary of the Interior to be actually necessary for surface or underground reservoirs, diverting and storage dams; together with such lands as the Secretary of the Interior may determine to be actually necessary for power houses, and all other structures or buildings necessary or properly incident to the construction, operation and maintenance of said water power and electric plants, telephone and telegraph lines, and such means of locomotion, transportation and communication as may be established; together with the right to take, free of cost, from the public lands, the Yosemite National Park and the Stanislaus National Forest adjacent to its right of way, within such distance as the Secretary of the Interior and the Secretary of Agriculture may determine, stone, earth, gravel, sand, tufa and other materials of like character actually necessary to be used in the construction, operation and repair of its said water power and electric plants, its said telephone and telegraph lines, and its said means of locomotion, transportation or communication, under such conditions and regulations as may be fixed by the Secretary of the Interior and the Secretary of Agriculture, within their respective jurisdictions, for the protection of the public lands, the Yosemite National Park and the Stanislaus National Forest:

Provided, That said grantee shall file, as hereinafter provided, a map or maps showing the boundaries, location and extent of said proposed rights of way and lands for the purposes hereinabove set forth: Provided further, That the Secretary of the Interior shall approve no location or change of location in the national forests unless said location or change of location shall have been approved in writing by the Secretary of Agriculture.

Sec. 2. That within three years after the passage of this Act said grantee shall file with the registers of the United States land offices, in the districts where said rights of way or lands are located, a map or maps showing the boundaries, locations and extent of said proposed rights of way and lands required for the purposes stated in section one of this Act; but no permanent construction work shall be commenced on said land until such map or maps shall have been filed as herein provided and approved by the Secretary of the Interior: Provided, however, That any changes of location of any of said rights of way or lands may be made by said grantee before the final completion of any of said work permitted in section one hereof, by filing such additional map or maps as may be necessary to show such changes of location, said additional map or maps to be filed in the same manner as the original map or maps; but no change of location shall become valid until approved by the Secretary of the Interior, and the approval by the Secretary of the Interior of said map or maps showing changes

of location of said rights of way or lands shall operate as an abandonment by the City and County of San Francisco to the extent of such change or changes of any of the rights of way or lands indicated on the original maps: And provided further, That any rights inuring to the grantee under this Act shall, on the approval of the map or maps referred to herein by the [142] Secretary of the Interior, relate back to the date of the filing of said map or maps with the register of the United States Land Office as provided herein, or to the date of the filing of such maps as they may be copies of as provided for herein: And provided further, That with reference to any map or maps heretofore filed by said City and County of San Francisco or its grantor with any officer of the Department of the Interior or the Department of Agriculture, and approved by said department, the provisions hereof will be considered complied with by the filing by said grantee of copies of any of such map or maps with the register of the United States Land Office as provided for herein, which said map or maps and locations shall as in all other cases be subject to the approval of the Secretary of the Interior.

Sec. 3. That the rights of way hereby granted shall not be effective over any lands upon which homestead, mining or other existing valid claim or claims shall have been filed or made and which now in law constitute prior rights to any claim of the grantee until said grantee shall have purchased such portion or portions of such homestead, mining or

other existing valid claims as it may require for right-of-way purposes and other purposes herein set forth, and shall have procured proper relinquishments of such portion or portions of such claims, or acquired title by due process of law and just compensation paid to said entrymen or claimants, and caused proper evidence of such fact to be filed with the Commissioner of the General Land Office, and the right of such entrymen or claimants to sell and of said grantee to purchase such portion or portions of such claims are hereby granted: Provided, however, that this Act shall not apply to any lands embraced in rights of way heretofore approved under any Act of Congress for the benefit of any parties other than said grantee or its predecessors in interest.

Sec. 4. That the said grantee shall conform to all regulations adopted and prescribed by the Secretary of the Interior governing the Yosemite National Park and by the Secretary of Agriculture governing the Stanislaus National Forest, and shall not take, cut or destroy any timber within the Yosemite National Park or the Stanislaus National Forest except such as may be actually necessary in order to construct, repair and operate its said reservoirs, dams, power plants, water power and electric works, and other structures above mentioned, but no timber shall be cut or removed from lands outside of the right of way until designated by the Secretary of the Interior or the Secretary of Agriculture, respectively; and it shall pay to the United States

the full value of all timber and wood cut, injured or destroyed on or adjacent to any of the rights of way and lands, as required by the Secretary of the Interior or the Secretary of Agriculture: Provided, That no timber shall be cut by the grantee in the Yosemite National Park except from land to be submerged or which constitutes an actual obstruction to the right or rights of way or to any road or trail provided in this Act: Provided, further, That for and in consideration of the rights and privileges hereby granted to it the said grantee shall construct and maintain in good repair such bridges or [143] other practicable crossings over its rights of way within the Stanislaus National Forest as may be prescribed in writing by the Secretary of Agriculture, and elsewhere on public lands along the line of said works, and within the Yosemite National Park as may be prescribed in writing by the Secretary of the Interior; and said grantee shall, as said water works are completed, if directed in writing by the Secretary of the Interior or the Secretary of Agriculture, construct and maintain along each side of said right of way a lawful fence of such character as may be prescribed by the proper Secretary, with such suitable lanes or crossings as the aforesaid officers shall prescribe: And provided further, That the said grantee shall clear its rights of way within the Yosemite National Park and the Stanislaus National Forest and over any public land of any debris or inflammable material as directed by the Secretary of the Interior and the Secretary of Agricul-

ture, respectively; and said grantee shall permit any road or trail which it may construct over the public lands, the Yosemite National Park or the Stanislaus National Forest to be freely used by the officials of the Government and by the public, and shall permit officials of the Government, for official business only, the free use of any telephone or telegraph lines, or equipment, or railroads that it may construct and maintain within the Yosemite National Park and the Stanislaus National Forest, or on the public lands, together with the right to connect with any such telephone or telegraph lines private telephone wires for the exclusive use of said Government officials: And provided further, That all reservoirs, dams, conduits, power plants, water power and electric works, bridges, fences and other structures not of a temporary character shall be sightly and of suitable exterior design and finish so as to harmonize with the surrounding landscape and its use as a park; and for this purpose all plans and designs shall be submitted for approval to the Secretary of the Interior.

Sec. 5. That all lands over which the rights of way mentioned in this Act shall pass shall be disposed of only subject to such easements: Provided, however, That the construction of the aforesaid works shall be prosecuted diligently, and no cessation of such construction shall continue for a period of three consecutive years, and in the event that the Secretary of the Interior shall find and deter-

mine that there has not been diligent prosecution of the work or of some integral and essential part thereof, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited all rights of the grantee herein as to that part of the works not constructed, and request the Attorney General, on behalf of the United States, to commence suit in the United States District Court for the Northern District of California for the purpose of procuring a judgment declaring all such rights to that part of the works not constructed to be forfeited to the United States, and upon such request it shall be the duty of the said Attorney General to cause to be commenced and prosecuted to a final judgment such suit: Provided further, That the Secretary of the Interior shall [144] make no such finding and take no such action if he shall find that the construction or progress of the works has been delayed or prevented by the act of God or the public enemy, or by engineering or other difficulties that could not have been reasonably foreseen and overcome, or by other special or peculiar difficulties beyond the control of the said grantee: Provided further, That, in the exercise of the rights granted by this Act, the grantee shall at all times comply with the regulations herein authorized, and in the event of any material departure therefrom the Secretary of the Interior or the Secretary of Agriculture, respectively, may take such action as may be necessary in the courts or otherwise to enforce such regulations.

Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

Sec. 7. That for and in consideration of the grant by the United States as provided for in this Act the said grantee shall assign, free of cost to the United States, all roads and trails built under the provisions hereof; and further, after the expiration of five years from the passage of this Act the grantee shall pay to the United States the sum of $15,000 annually for a period of ten years, beginning with the expiration of the five-year period before mentioned, and for the next ten years following $20,000 annually, and for the remainder of the term of the grant shall, unless in the discretion of Congress the annual charge should be increased or diminished, pay the sum of $30,000 annually, said sums to be paid on the first day of July of each year. Until otherwise provided by Congress, said sums shall be kept in a separate fund by the United States, to be applied to the building and maintenance of roads and trails and

other improvements in the Yosemite National Park and other national parks in the State of California. The Secretary of the Interior shall designate the uses to be made of sums paid under the provisions of this section under the conditions specified herein.

Sec. 8. That the word "grantee" as used herein shall be understood as meaning the City and County of San Francisco and such other municipalities or water district or water districts as may, with the consent of the City and County of San Francisco or in accordance with the laws of the State of California, hereafter participate in or succeed to the beneficial rights and privileges granted by this Act.

Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated: [145]

(a) That upon the completion of the Hetch Hetchy Dam or the Lake Eleanor Dam, in the Yosemite National Park, by the grantee, as herein specified, and upon the commencement of the use of any reservoirs thereby created by said grantee as a source of water supply for said grantee, the following sanitary regulations shall be made effective within the watershed above and around said reservoir sites so used by said grantee:

First. No human excrement, garbage, or other refuse shall be placed in the waters of any reservoir or stream or within three hundred feet thereof.

Second. All sewage from permanent camps and hotels within the watershed shall be filtered by natural percolation through porous earth or otherwise adequately purified or destroyed.

Third. No person shall bathe, wash clothes or cooking utensils, or water stock in, or in any way pollute, the water within the limits of the Hetch Hetchy Reservoir or any reservoir constructed by the said grantee under the provisions of this grant, or in the streams leading thereto, within one mile of said reservoir; or, with reference to the Hetch Hetchy Reservoir, in the waters from the reservoir or waters entering the river between it and the "Early intake" of the aqueduct pending the completion of the aqueduct between "Early intake" and the Hetch Hetchy dam site.

Fourth. The cost of the inspection necessary to secure compliance with the sanitary regulations made a part of these conditions, which inspection shall be under the direction of the Secretary of the Interior, shall be defrayed by the said grantee.

Fifth. If, at any time the sanitary regulations provided for herein shall be deemed by said grantee insufficient to protect the purity of the water supply, then the said grantee shall install a filtration plant or provide other means to guard the purity of the water. No other sanitary rules or restrictions shall be demanded by or granted to the said grantee as to the use of the watershed by campers, tourists, or the occupants of hotels and cottages.

(b) That the said grantee shall recognize the prior rights of the Modesto Irrigation District

and the Turlock Irrigation District as now constituted under the laws of the State of California, or as said districts may be hereafter enlarged to contain in the aggregate not to exceed three hundred thousand acres of land, to receive two thousand three hundred and fifty second-feet of the natural daily flow of the Tuolumne River, measured at the La Grange Dam, whenever the same can be beneficially used by said irrigation districts, and that the grantee shall never interfere with said rights.

(c) That whenever said irrigation districts receive at the La Grange Dam less than two thousand three hundred and fifty second-feet of water, and when it is necessary [146] for their beneficial use to receive more water the said grantee shall release free of charge, out of the natural daily flow of the streams which it has intercepted, so much water as may be necessary for the beneficial use of said irrigation districts not exceeding an amount which, with the waters of the Tuolumne and its tributaries, will cause a flow at La Grange Dam of two thousand three hundred and fifty second-feet; and shall also recognize the rights of the said irrigation districts to the extent of four thousand second-feet of water out of the natural daily flow of the Tuolumne River for combined direct use and collection into storage reservoirs as may be provided by said irrigation districts, during the period of sixty days immediately following and including April fifteenth of each year, and shall during such period release free of charge such quantity of water

as may be necessary to secure to the said irrigation districts such four thousand second-feet flow or portion thereof as the said irrigation districts are capable of beneficially directly using and storing below Jawbone Creek: Provided, however, That at such times as the aggregate daily natural flow of the watershed of the Tuolumne and its tributaries measured at the La Grange Dam shall be less than said districts can beneficially use and less than two thousand three hundred and fifty second-feet, then and in that event the said grantee shall release, free of charge, the entire natural daily flow of the streams which it has under this grant intercepted.

(d) That the said grantee whenever the said irrigation districts desire water in excess of that to which they are entitled under the foregoing, shall on the written demand of the said irrigation districts sell to the said irrigation districts from the reservoir or reservoirs of the said grantee such amounts of stored water as may be needed for the beneficial use of the said irrigation districts at such a price as will return to the grantee the actual total costs of providing such stored water, such costs to be computed in accordance with the currently accepted practice of public cost accounting as may be determined by the Secretary of the Interior, including, however, a fair proportion of the cost to said grantee of the conduit, lands, dams, and water-supply system included in the Hetch Hetchy and Lake Eleanor sites; upon the express condition, however, that the said grantee may require the said

irrigation districts to purchase and pay for a minimum quantity of such stored water, and that the said grantee shall be entitled to receive compensation for a minimum quantity of stored water and shall not be required to sell and deliver to the said irrigation districts more than a maximum quantity of such stored water to be released during any calendar year: Provided, however, That if the said irrigation districts shall develop sufficient water to meet their own needs for beneficial use and shall so notify in writing the Secretary of the Interior, the said grantee shall not be required to sell or deliver to said irrigation districts the maximum or minimum amount of stored waters hereinbefore provided for, and shall release the said districts from the obligation to pay for such stored water: And provided further, That said grantee shall without cost to said irrigation districts return to the Tuolumne River above the La Grange Dam for the use of the said irrigation [147] districts all surplus or waste water resulting from the development of hydroelectric energy generated by the said grantee.

(e) That such minimum and maximum amounts of such stored water to be so released during any calendar year as hereinbefore provided and the price to be paid therefor by the said irrigation districts are to be determined and fixed by the Secretary of the Interior in accordance with the provisions of the preceding paragraph.

(f) That the Secretary of the Interior shall revise the maximum and minimum amounts of

stored water to be supplied to said irrigation districts by said grantee as hereinbefore provided, whenever the said irrigation districts have properly developed the facilities of the Davis Reservoir of the Turlock Irrigation District and the Warner-Dallas Reservoir of the Modesto Irrigation District to the fullest practicable extent up to a development not exceeding in cost $15 per acre-foot storage capacity, and whenever additional storage has been provided by the said irrigation districts which is necessary to the economical utilization of the waters of said watershed, and also after water losses and wastes have been reduced to such reasonable minimum as will assure the economical and beneficial use of such water.

(g) That the said grantee shall not be required to furnish more than the said minimum quantity of stored water hereinbefore provided for until the said irrigation districts shall have first drawn upon their own stored water to the fullest practicable extent.

(h) That the said grantee shall not divert beyond the limits of the San Joaquin Valley any more of the waters from the Tuolumne watershed than, together with the waters which it now has or may hereafter acquire, shall be necessary for its beneficial use for domestic and other municipal purposes.

(i) That the said grantee shall, at its own expense, locate and construct, under the direction of the Secretary of the Interior, such weirs or other

suitable structures on sites to be granted, if necessary, by the United States, for accurately measuring the flow in the said river at or above La Grange Dam, and measuring the flow into and out from the reservoirs or intakes of said districts, and into and out from any reservoirs constructed by the said grantee, and at any other point on the Tuolumne River or its tributaries, which he may designate, and fit the same with water-measuring apparatus satisfactory to said Secretary and keep such hydrographic records as he may direct, such apparatus and records to be open to inspection by any interested party at any time.

(j) That by 'the flow,' 'natural daily flow,' 'aggregate daily natural flow,' and 'what is naturally flowing,' as are used herein, is meant such flow as on any given day would flow in the Tuolumne River or its tributaries if said grantee had no storage or diversion works on the said Tuolumne watershed. [148]

(k) That when the said grantee begins the development of the Hetch Hetchy Reservoir site, it shall undertake and vigorously prosecute to completion a dam at least two hundred feet high, with a foundation capable of supporting said dam when built to its greatest economic and safe height.

(l) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for

drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated, and which may be so beneficially used by said irrigation districts or municipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein: Provided, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(m) That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy, as follows: The said

grantee shall within three years from the date of completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to [149] said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further, said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file such maps, surveys, field notes, or

other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(n) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale, such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interest demands or convenience requires; and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use and sale of such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower; and for that purpose the Secretary of the Interior may take possession of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed by the grantee hereunder as may be necessary for

the development, transmission, use, and sale of such power.

(o) That the rates or charges to be made by the grantee or by any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior, allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee.

(p) That this grant is upon the further condition that the grantee shall construct on the north side of the Hetch Hetchy Reservoir site a scenic road or trail, as the Secretary of the Interior may determine, above and along the [150] proposed lake to such point as may be designated by the said Secretary, and also leading from said scenic road or trail a trail to the Tiltill Valley and to Lake Vernon, and a road or trail to Lake Eleanor and Cherry Valley via McGill Meadow; and likewise the said grantee shall build a wagon road from Hamilton or Smiths Station along the most feasible route adjacent to its proposed aqueduct from Groveland to Portulaca or Hog Ranch and into the Hetch Hetchy Dam site,

and a road along the southerly slope of Smiths Peak from Hog Ranch past Harden Lake to a junction with the old Tioga Road in section four, township one south, range twenty-one east, Mount Diablo base and meridian, and such roads and trails made necessary by this grant, and as may be prescribed by the Secretary of the Interior. Said grantee shall have the right to build and maintain such other necessary roads or trails through the public lands, for the construction and operation of its works, subject, however, to the approval of the Secretary of Agriculture in the Stanislaus National Forest, and the Secretary of the Interior in the Yosemite National Park. The said grantee shall further lay and maintain a water pipe, or otherwise provide a good and sufficient supply of water for camp purposes at the Meadow, one-third of a mile, more or less, southeasterly from the Hetch Hetchy Dam site.

That all trail and road building and maintenance by the said grantee in the Yosemite National Park and the Stanislaus National Forest shall be done subject to the direction and approval of the Secretary of the Interior or the Secretary of Agriculture according to their respective jurisdictions.

(q) That the said grantee shall furnish water at cost to any authorized occupant within one mile of the reservoir and in addition to the sums provided for in section seven it shall reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed.

(r) That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations and decisions respecting the rights, benefits, or obligations specified in this Act, which investigations or decisions involve expense to the said Department of the Interior, then such expense shall be borne by said grantee.

(s) That the grantee shall file with the Secretary of the Interior, within six months after the approval of this Act, its acceptance of the terms and conditions of this grant.

(t) That the grantee herein shall convey to the United States, by proper conveyance, a good and sufficient title free from all liens and encumbrances of any nature whatever, to any and all tracts of land which are now owned by said grantee within the Yosemite National Park or that part of the national forest adjacent thereto not actually required for use under the provisions of this Act, said conveyance to [151] be approved by and filed with the Secretary of the Interior within six months after the said grantee ceases to use such lands for the purpose of construction or repair under the provisions of this Act.

(u) That the City and County of San Francisco shall sell to the United States, for the use of the War Department, such water as the War Department may elect to take, and shall deliver the same through its system in or near the City of San Francisco to the mains or systems of such military reservations in that vicinity as may be designated by the Secretary of War, under such rules and regu-

lations as he may prescribe. In payment for such water and the delivery thereof the United States shall pay to the said City and County of San Francisco a rental, to be calculated at a fixed rate per one thousand gallons, said rate not to exceed the actual cost of said water to said City and County for all the water so furnished, as determined by meter measurements: And provided further, That payment of said rental shall be made by the local disbursing officer of the War Department in the usual manner: Provided, however, That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.

Sec. 10. That this grant, so far as it relates to the said irrigation districts, shall be deemed and held to constitute a binding obligation upon said grantee in favor of the said irrigation districts which said districts, or either of them, may judicially enforce in any court of competent jurisdiction.

Sec. 11. That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to

interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State."

Counsel for the plaintiff then pointed out that the complaint alleged that the grant made by the Raker Act, with its terms and conditions had been accepted by the defendant in an ordinance passed by its Board of Supervisors January 12, 1914, and approved by its Mayor, January 13, 1914, and filed by the defendant with the Secretary of the [152] Interior of the United States on January 21, 1914. Counsel for the plaintiff offered in evidence a copy of said Ordinance, together with a copy of a letter dated January 15, 1915, from the Mayor of San Francisco to the Secretary of the Interior, transmitting said Ordinance to said Secretary.

Counsel for the defendant objected to said Ordinance upon the grounds that it was irrelevant, immaterial and incompetent, and that the Board of Supervisors of the defendant, City and County, had no power to bind the defendant as to any particular method of distribution of its electric power, inasmuch as that matter rested entirely with the citizens.

Counsel for the plaintiff thereupon stated that the Raker Act was a grant of power upon certain con-

ditions and certain covenants to be performed by the grantee, the City and County of San Francisco, and that the plaintiff desired to show that the grant had been officially accepted by the defendant, and that pursuant to its acceptance thereof the defendant had entered upon and occupied certain portions of public lands of the United States, and used certain easements upon the public lands in the vicinity of the National Forest and Yosemite National Park and Stanislaus National Forest. Thereupon the Court overruled the objection of the defendant to said Ordinance, and admitted said ordinance in evidence. In its ruling admitting said Ordinance in evidence, the Court stated that it was admitted in evidence "to the extent limited in the offer".

Counsel for the defendant duly excepted to the ruling admitting said Ordinance in evidence; said Ruling and exception are herein designated as Ruling and Exception No. 1.

Said Ordinance and letter of transmittal were thereupon marked

"U. S. EXHIBIT 2".

Said Ordinance reads as follows: [153]

"BILL NO. 2855, ORDINANCE NO. 2598 (New Series)

"ACCEPTING THE TERMS AND CONDITIONS OF THE HETCH HETCHY GRANT.

"BE IT ORDAINED BY THE PEOPLE of the City and County of San Francisco as follows:

"That whereas, on the 19th day of December 1913, the President of the United States duly approved an Act of Congress entitled:

"'An Act Granting to the city and county of San Francisco certain rights of way in, over, and through certain public lands, the Yosemite National Park, and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes.'

"And whereas in subsection (S) of Section 9 of said Act it is provided 'That the grantee shall file with the Secretary of the Interior, within six months after the approval of this Act, its acceptance of the terms and conditions of this grant.'

"NOW, THEREFORE, in accordance with the said provisions of said Act of Congress and in particular of subsection (S), Section 9 thereof, the City and County of San Francisco does hereby accept the said grant and all the terms and conditions therein contained, and the Mayor is hereby directed, upon approval of this ordinance to forthwith file with the Secretary of the Interior of the United States an official copy of this ordinance as evidence of such acceptance.

"This ordinance shall take effect immediately.

PASSED FOR PRINTING—Board of Supervisors, San Francisco, Jan. 5, 1914.

Ayes: Supervisors Bancroft, Caglieri, A. J. Gallagher, C. E. Gallagher, Giannini, Hayden, Hilmer, Hocks, Jennings, Koshland, Mauzy, McCarthy, McLaran, Murdock, Murphy, Nolan, Payot, Vogelsang.

FINALLY PASSED—Board of Supervisors, San Francisco, Jan. 12, 1914.

Ayes: Supervisors Bancroft, Deasy, Gallagher, Hayden, Hilmer, Hocks, Jennings, McCarthy, McLaran, Murdock, Nelson, Nolan, Payot, Power, Suhr, Vogelsang, Walsh. (One vacancy).

"J. S. DUNNIGAN

Clerk.

"Approved, San Francisco, January 13th, 1914.

[Seal] J. S. DUNNIGAN,

Clerk.

JAMES ROLPH,

Mayor."

Said letter of transmittal reads as follows:

"Mayor's Office, San Francisco,
January 15, 1914.

"Sir: [154]

"By direction of the Board of Supervisors of the City and County of San Francisco, approved by me as Mayor, I send you herewith certified copy of Ordinance No. 2598 (New

Series) with original signatures, said ordinance having been passed in compliance with the provisions of the Charter of the City and County of San Francisco, duly advertised, and approved by me as Mayor on January 13, 1914.

"This ordinance is passed by the City and County of San Francisco in compliance with subsection S of Section 9 of an Act of Congress, entitled 'An Act granting to the City and County of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park, and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes,' approved by the President of the United States on the 19th day of December, 1913.

"Respectfully yours,

JAMES ROLPH, JR.
Mayor, City and County of San Francisco.

To Hon. Franklin K. Lane,
Secretary of the Interior,
Washington, D. C."

Counsel for the plaintiff thereupon offered in evidence thirty-nine maps (being the maps, copies of which constitute "Exhibit C" annexed to the Amendments to the Bill of Complaint herein, filed June 25, 1937) which he said delineated the lands

and rights of way occupied and to be occupied by the defendant, City and County of San Francisco in the development of the Hetch Hetchy project, as described in paragraph VI of the complaint herein, and two additional maps which he stated were not in his possession at the time the amendments to the Bill of Complaint were filed, but which, he stated, covered portions of the land occupied by the City and County of San Francisco pursuant to the grant contained in the Raker Act.

Said forty-one maps were thereupon admitted in evidence and marked "U. S. Exhibit 3".

Because of their character and size it is impractical to set forth said maps herein, but said original exhibit, properly identified, will [155] be transmitted to the Clerk of the United States Circuit Court of Appeals, with the Transcript on Appeal in this case for use in connection with said appeal with like effect as though the same were incorporated herein.

Counsel for the plaintiff thereupon offered in evidence photostatic copies of the description by legal subdivisions of the lands referred to in paragraph VI of the Bill of Complaint. Said photostatic copies of said descriptions were admitted in evidence and marked "U. S. Exhibit 4".

Because of their character and size it is impractical to set forth said description by legal subdivisions herein, but photostatic copies thereof are incorporated herein, at this point and said original exhibit, properly identified, will be transmitted to

the Clerk of the United States Circuit Court of Appeals, with the Transcript on Appeal in this case for use in connection with said appeal with like effect as though the same were incorporated herein.

Counsel for the plaintiff thereupon offered in evidence a composite photograph of the plats filed by the City and County of San Francisco with the Secretary of the Interior showing the lands and rights of way taken by the City for the purpose of constructing its Hetch Hetchy project. Said photograph was admitted in evidence and marked "U. S. Exhibit 5". Because of its character and size it is impractical to incorporate said photograph herein, but a photostatic copy thereof is incorporated herein at this point, and said original exhibit, properly identified, will be transmitted to the Clerk of the United States Circuit Court of Appeals, with the Transcript on Appeal in this case for use in connection with said appeal as though the same were incorporated herein.

Counsel for the defendant, at this point, offered a similar composite photograph of the plats filed by the defendant with the Secretary [156] of the Interior and showing the lands and rights of way taken by the City for the purpose of constructing its Hetch Hetchy project. Said photograph offered by the defendant was received in evidence and marked "Defendant's Exhibit A".

Because of the character and size of said photograph it is impractical to incorporate the same herein, but a photostatic copy thereof is incorpo-

rated herein at this point, and said original exhibit, properly identified, will be transmitted to the Clerk of the United States Circuit Court of Appeals, with the Transcript on Appeal in this case for use in connection with said appeal with like effect as though the same were incorporated herein.

Counsel for the plaintiff thereupon offered in evidence a certified copy of a contract dated July 1, 1925, between the Board of Public Works of the City and County of San Francisco (acting for and on behalf of said City and County), and Pacific Gas and Electric Company, with respect to the distribution of the electric energy generated by the defendant in connection with its Hetch Hetchy project and a copy whereof marked "Exhibit A" is annexed to defendant's answer herein. Said contract was admitted in evidence and marked "U. S. Exhibit 6". Said contract is not incorporated herein because a copy thereof is annexed to defendant's answer as aforesaid, and is included in the judgment roll herein.

Counsel for the plaintiff thereupon offered in evidence a certified copy of a telegram dated March 13, 1935, from Harold L. Ickes, Secretary of the Interior, to Angelo J. Rossi, Mayor of the City and County of San Francisco. Counsel for the defendant objected to said telegram upon the ground that it was irrelevant, incompetent and immaterial, and a mere self-serving declaration. Counsel for the plaintiff stated that the offer was made to prove that the Secretary of the Interior had made the decision

required by Section 9 U of the Raker Act and that his decision was not an arbitrary one, but was one arrived at after an open hearing at which the defendant was represented, and because of the denial in the answer of the allegation in the complaint to the effect that the Secretary of the [157] Interior, pursuant to the terms of the Raker Act, and more specifically Section 9(u) thereof, did on April 2, 1937, advise the Honorable Homer Cummings, Attorney General of the United States of the failure and refusal of the defendant to observe and comply with other terms and conditions of the Raker Act, and did in writing, request that suit be instituted for the purpose of enforcing and carrying out the same. Thereupon the Court admitted said telegram in evidence, and stated, in connection with its ruling, that said telegram was admitted "for the purpose of the offer". Counsel for the defendant duly excepted to the ruling admitting said telegram in evidence; said ruling and exception are hereby designated as Ruling and Exception No. 2.

Said telegram was marked

"U. S. EXHIBIT No. 7".

It reads as follows:

"In view of charges that Raker Act is violated by present arrangement between City and County of San Francisco and the Pacific Gas and Electric Company, I have arranged for a hearing on the subject in my office the afternoon of May six at two o'clock, at which I hope

City and County of San Francisco will be represented.

HAROLD L. ICKES,
Secretary."

Counsel for the plaintiff thereupon offered in evidence a certified copy of a letter dated March 13, 1935, from Harold L. Ickes, Secretary of the Interior, to H. G. Cahill, Manager of Public Utilities of San Francisco. Counsel for the defendant objected to said letter upon the ground that it was incompetent, irrelevant and immaterial, self-serving, and upon the further ground that the defendant was raising no question that the approval of the Secretary of the Interior to the enlargement of Hetch Hetchy Dam according to plans and specifications theretofore submitted to him, was a waiver of any right of the plaintiff under the Raker Act. The Court overruled said objection and admitted said letter in evidence. Counsel for the defendant duly excepted to the ruling admitting said letter in evidence; said ruling and excep- [158] tion are herein designated as Ruling and Exception No. 3. Said letter was marked

"U. S. EXHIBIT No. 8".

It reads as follows:

"My dear Mr. Cahill:

"With your letter of November 20, 1934, you transmitted revised plans and specifications for the enlargement of the Hetch Hetchy Dam. Inasmuch as those plans have been found satis-

factory by the National Park Service and the Bureau of Reclamation, I have today sent you the following telegram:

"'Am mailing you letter today giving you my formal approval to proceed with enlargement of Hetch Hetchy Dam according to plans and specifications heretofore submitted. Question has been raised whether provisions of Raker Act are being violated by present arrangement with Pacific Gas and Electric Company and permission to proceed with addition to Hetch Hetchy Dam is not to be regarded as direct or implied approval of that arrangement. There will be an open hearing in my office on question whether Raker Act is being violated afternoon of May six at two o'clock, at which I hope your Commission will be represented."

"I am also telegraphing Mayor Rossi with reference to this hearing and expressing the hope to him that the City and County of San Francisco will be there represented. This hearing will be open to anyone interested and opportunity will be offered to present divergent views.

Sincerely yours
(Sgd.) HAROLD L. ICKES
Secretary of the Interior."

Mr. H. G. Cahill,
Manager of Utilities,
Public Utilities Commission of San Francisco,
San Francisco, California."

Counsel for the plaintiff thereupon offered in evidence a certified copy of telegram dated March 14, 1935, from Angelo J. Rossi, Mayor of San Francisco, to Harold L. Ickes, Secretary of the Interior. Counsel for the defendant objected to said telegram upon the ground that it was incompetent, irrelevant and immaterial. The Court overruled said objection and admitted said telegram in evidence. Counsel for the defendant duly excepted to the ruling of the Court admitting said telegram in evidence; said ruling and exception are hereby designated Ruling and Exception No. 4. Said telegram was marked

"U. S. EXHIBIT No. 9".

It reads as follows: [159]

"San Francisco, Calif., March 14, 1935.

"Hon. Harold L. Ickes,
Secretary of the Interior, Washn., D. C.

"I acknowledge receipt of your wire of this date re Hetch Hetchy Power Stop I note your statement that charges have been filed wherein it is alleged that San Francisco is violating provisions of the Raker Act as to distribution of power Stop Please send me copies of same Stop We appreciate the invitation to be present at the hearing on May sixth Stop San Francisco will be represented at that time.

ANGELO J. ROSSI
Mayor."

Counsel for the plaintiff thereupon offered in evidence a letter dated March 15, 1935, from Harold L. Ickes, Secretary of the Interior to Angelo J. Rossi, Mayor of the City and County of San Francisco. Counsel for the defendant objected to said letter on the ground that it was incompetent, irrelevant, immaterial and self-serving. The Court overruled said objection and admitted said letter in evidence. Counsel for the defendant duly excepted to the ruling admitting said letter in evidence; said ruling and exception are herein designated as Ruling and Exception No. 5. Said letter was marked

"U. S. EXHIBIT No. 10".

It reads as follows:

"Hon. Angelo J. Rossi, Mayor,
San Francisco, California.

"My dear Mayor Rossi:

"I have received your telegram of March 14 concerning the alleged violation of the Raker Act arising from the method by which Hetch Hetchy power is being distributed. I am, of course, pleased that San Francisco will be represented at the hearing which I have set for May 6.

"No formal charges have been filed to which San Francisco must make specific response. I have, however, received communications from various individuals contending that the exist-

ing arrangement; whereby the Pacific Gas and Electric Company distributes power generated on the Hetch Hetchy project, constitutes a violation of the prohibition contained in that portion of section 6 of the Raker Act, which reads as follows:

> 'That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee * * * ' [160]

It is that contention in which I am interested and which I desire to consider at the hearing on May 6.

"I hope that, at the hearing, San Francisco and any other interested parties may present facts and argument sufficient to make possible a final determination of this important matter.

Sincerely yours,

(Sgd.) HAROLD L. ICKES
Secretary of the Interior."

Counsel for the plaintiff thereupon offered in evidence a certified copy of an opinion rendered by Harold L. Ickes, Secretary of the Interior, on August 24, 1935, (which counsel stated followed the hearing held by him on May 6, 1935, which is mentioned in the aforesaid letter of March 15, 1935 (U. S. Exhibit No. 10). Counsel for the defendant

objected to the offer upon the ground that it was incompetent, irrelevant and immaterial, and self-serving. Thereupon counsel for the plaintiff stated that the offer was made to show compliance with the terms of the Raker Act, namely, that after a hearing by the Secretary of the Interior, he rendered a decision that the contract of July 1, 1925, constituted a violation of Section 6 of the Raker Act and had so notified the City and County of San Francisco; also to show that the Secretary's determination was not an arbitrary action. The Court, thereupon, overruled defendant's objection and received the letter in evidence, stating in connection with its ruling, that the opinion was admitted for the limited purpose stated by counsel for the plaintiff. Thereupon the attorney for the defendant duly excepted to said ruling admitting said opinion in evidence. Said ruling and exception are herein designated as Ruling and Exception No. 6.

Said opinion was marked

"U. S. EXHIBIT No. 11";

it reads as follows:

"United States
Department of the Interior
Office of the Secretary
Washington

August 24, 1935.

SUMMARY OF OPINION [161]

1. The controversy concerning the legality of the distribution of Hetch Hetchy power by

the Pacific Gas and Electric Company has been before the Department, in one form or another, for approximately 12 years.

2. The arrangement, founded on the contract of July 1, 1925, whereby the Pacific Gas and Electric Company distributes the power generated at the Moccasin plant on the Hetch Hetchy project, constitutes a violation of the provisions contained in section 6 of the Raker Act.

3. The direct sale by San Francisco to the Pacific Gas and Electric Company of power generated at the Early Intake power plant also constitutes a violation of the provisions contained in section 6 of the Raker Act.

4. The legislative history of the Raker Act clearly shows that the purpose of section 6 was to prevent the water or power developed on the Hetch Hetchy project from ever falling into the hands of a private corporation or monopoly. From the facts it appears that the power developed on the Hetch Hetchy project has fallen into the hands of just such a corporation or monopoly.

United States
Department of the Interior
Office of the Secretary
Washington

August 24, 1935.

In re the contract between San Francisco and the Pacific Gas and Electric Company in relationship to the Raker Act.

The question before me for decision is whether the action of the City and County of San Francisco in contracting with the Pacific Gas and Electric Company for the distribution of electric power generated by it in connection with the Hetch Hetchy Project constitutes a violation of the provisions of the Raker Act (38 Stats., 242). By that act the City and County of San Francisco was authorized to construct and operate the Hetch Hetchy Project within the Yosemite National Park, the Stanislaus National Forest and the public domain of the United States.

In the autumn of 1934 I instructed the Solicitor of the Department of the Interior to advise me whether, in his opinion, the Raker Act was being violated. Shortly thereafter I directed the Director of the Division of Investigations to investigate and report to me on the facts in connec- [162] tion with the arrangement between the City and County of San

Francisco and the Pacific Gas and Electric Company whereby the latter named corporation was distributing this electric power. This report on the facts was submitted to me on February 4, last, with an accompanying memorandum by the Solicitor on the law involved. Thereafter, on May 6, last, I held an open hearing at the Interior Department in the City of Washington, at which San Francisco and other interested parties were represented. At and since the time of that hearing several briefs pertinent to the inquiry have been filed with me and a considerable amount of argumentative correspondence has been received.

After careful consideration of all the facts presented and of the arguments made on behalf of the City and County of San Francisco, and other interested parties, I have come to the conclusion that the provisions of the Raker Act are being and for some time past have been violated. As the parties in interest are entitled to know upon what grounds my conclusion is based, I shall discuss as briefly as may be the facts and the law that seem to me to be applicable to and controlling of the issues involved. First, however, I believe it would be helpful to a clear understanding of the case to present a resume of the history of the problem that is before me for decision.

I.

On May 8, 1923, the National Park Service called to the attention of the Secretary of the Interior the fact that the City and County of San Francisco was openly selling Hetch Hetchy power to the Pacific Gas and Electric Company which, in turn, was selling that power to its consumers. First Assistant Secretary Finney, on May 22, 1923, requested the opinion of Solicitor Edwards concerning the legality of that procedure. In an opinion dated June 8, 1923, the Solicitor determined that any sale of Hetch Hetchy power for the purpose of resale was prohibited by the Raker Act. He recognized the fact, however, that due to the difficulty of acquiring or constructing a distributing system a great waste of power would result unless the then existing distributing facilities might be utilized. To obviate such a possibility of waste he suggested that an arrangement be made 'by which the grantee would have its power transmitted over the lines of the concern owning or controlling the existing distribution system'.

Presumably as a result of this suggestion the City and County of San Francisco on July 1, 1925, entered into a contract with the Pacific Gas and Electric Company for the distribution of Hetch Hetchy power. The propriety of that contract, under which power is still being distributed by the private concern, was questioned immediately. On July 20, 1935, Acting Solicitor

Wright rendered an opinion in which, after significant reference to the temporary character of the contract and the inability of San Francisco to obtain its own distributing system for at least two years, [163] he held that the contract was one of agency or consignment and not one of sale in violation of the provisions of the statute. The opinion, however, did recognize the fact that operations under the contract might be conducted in such a way as to constitute a violation of the statutory prohibitions.

A copy of that opinion was transmitted to the Attorney General with the request that he advise the Department of his views concerning the contract. That he refused to do on the ground that the Department of Justice could not commit itself on a legal question which that Department might subsequently be called upon to litigate. In his letter of August 5, 1925, however, the Attorney General, Mr. Sargent, did indicate the view to be taken on the question. Immediately after pointing out that the contract might be viewed (1) as Proper, (2) as improper, or (3) as proper because temporary, he stated, 'In the exercise of your discretion you may come to the conclusion that this last is the correct view.'

After receiving that advice, Secretary Work on August 19, 1925, wrote to Mayor Rolph of San Francisco to the effect that no action would

be taken by the Department until such time as the facts attendant on the future performance of the contract with the Pacific Gas and Electric Company might be sufficient to indicate whether the provisions of the statute were being met. The contract has been in effect continuously since that time.

Apparently the issue lay dormant until it was brought to life by Congressman Crampton who, on May 19, 1928, delivered on the floor of the House of Representatives a vigorous attack against San Francisco, charging, among other things, the sale of electric power to the Pacific Gas and Electric Company in 'direct and open violation' of the Raker Act. Cong. Rec., vol. 69, p. 9236. See also Cong. Rec. vol. 69, pp. 9239-9242. On February 23, 1929, Congressman Crampton wrote to Secretary West in effect demanding action because of San Francisco's violation of the statutory provisions regarding the sale of power. As a result of that demand Secretary West, on March 2, 1929, wrote to Mayor Rolph requesting certain information concerning the performance of the power sales contract and concerning the time which must elapse before San Francisco might acquire its own power distributing system. Mayor Rolph's reply of April 4, 1929, addressed to Secretary Wilbur, indicated the profits which had been realized by San Francisco from the contract and set out in some detail the steps

which had been taken by the City and County looking toward the acquisition of the distributing systems of the Pacific Gas and Electric Company and the Great Western Power Company. (The latter company has since been absorbed by the former.) At that time proceedings had been begun before the California Railroad Commission for the purpose of fixing the value of the properties of those two companies so that a purchase might be effected.

With those materials at hand Solicitor Finney, on May [164] 29, 1929, rendered an opinion in which it was set out that 'any method for the distribution of the power generated under this grant, involving an element of private gain, can only be justified as a temporary arrangement, and to avoid waste, and only so long as the City and County in the meantime are proceeding in good faith and with diligence to comply with the conditions and to meet the obligations imposed upon them by the law and the acceptance of the grant.' The Solicitor, however, refused to express his opinion on the facts before him, saying that, since the Attorney General must bring suit if a violation existed, the opinion of that official should be had. Such an opinion was requested in a letter dated February 28, 1930. To that request Attorney General Mitchell responded on April 26, 1930, suggesting that representatives of the

two departments confer 'to develop the situation more fully.'

When the representatives met it was determined that additional information was necessary. Eventually it was learned not only that the California Railroad Commission had fixed a value on the distributing systems of the two concerns which San Francisco desired to purchase, but also that the City and County had arranged to submit to the electors on August 26, 1930, a proposed bond issue sufficient to finance the acquisition of the necessary systems. In view of those facts the Attorney General suggested, and Secretary Wilbur agreed, that no further action be taken until the result of the election had been determined. The electors, however, failed to approve the bond issue.

After that, Secretary Wilbur arranged a conference, after notice to the Attorney General, at which San Francisco was given an opportunity to present its case. For the consideration of that conference Secretary Wilbur, on November 8, 1930, transmitted to the Mayor of San Francisco a memorandum stating that the Department 'cannot permit the arrangement between the city and the company to go on indefinitely, as an end in itself', and suggesting three courses of action open to San Francisco: (1) the immediate calling of another bond election; (2) the termination of the 'agency' contract in the absence of a bond election; or (3)

application to Congress for modification of the Raker Act.

At the conference, which was held on December 4, 1930, San Francisco submitted further argument concerning the legality of the contract with the Pacific Gas and Electric Company as a temporary expedient. With that argument apparently there was submitted, although there appears to be no copy of it in the files, a tentative program whereby San Francisco proposed to acquire a distributing system and terminate the existing contract within three years. The only reference found to any departmental consideration given to, or action taken on, San Francisco's plea is the following short paragraph contained in a letter of December 8, 1930, from Secretary Wilbur to Mr. John J. O'Toole, city attorney of San Francisco. [165]

> 'I note that your communication advises the Department of the City's three-year program for compliance with the provisions of the Raker Act respecting power distribution, which will be followed with interest. Kindly keep me advised of the completion of the successive steps outlined.'

Subsequent to this communication, the departmental files show nothing pertinent to this question until the present inquiry was begun. It does appear, however, that another bond election was held in San Francisco on September 29, 1933, for the purpose of authorizing

the sale of bonds sufficient to construct a small municipal distributing system. This bond proposal was also rejected by the voters.

II.

It is necessary to a determination of the issues to consider in some detail the statutory provisions relating to the disposal of the power generated from the Hetch Hetchy project. It is also necessary to consider the terms of the contract under which the Pacific Gas and Electric Company has been and is distributing that power.

In Section 9 (f) of the Raker Act there is an express provision covering the use to which electric power may be put. It is to be utilized first for the pumping of the water supply for San Francisco and for the actual municipal needs of the City and County not including 'sale to private individuals or corporations.' Any excess of power must be sold, on request, to satisfy the needs of the landowners of the Modesto Irrigation District and the Turlock Irrigation District for the pumping of subsurface waters to effectuate irrigation or drainage and for the needs of municipalities within those districts, again not including 'sale to private individuals or corporations'. Any remaining power may be sold by San Francisco to private individuals, corporations or others 'for commercial purposes'. This authority is limited,

however, by section 6 of the act which provides:

> 'That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.'

It has been argued that a direct sale of power by San Francisco to the Pacific Gas and Electric Company for the express purpose of resale would not constitute a violation of the prohibitions contained in section 6 for the reason that the company, as a public utility, already has the right to sell power to consumers, and, thus, need not be invested [166] by the City and County with that right in violation of the statutory prohibitions. This contention confuses the right or authority of the company to sell power in general to consumers with its right to sell them the power generated through the operation of the Hetch Hetchy project. It also confuses the authority of a private corporation, under the terms of its charter and the provisions of laws

creating it, to dispense among consumers such electric energy as it is in a position legally to control with the disability of the City and County of San Francisco, under the terms of the Hetch Hetchy grant, to sell or let Hetch Hetchy water or power to such a corporation for purposes of resale to consumers. In each instance, it is the latter, not the former, that is in issue here.

We are not particularly concerned with the question whether the sale or disposition of Hetch Hetchy power by the Pacific Gas and Electric Company to consumers is ultra vires. The real question is whether the sale or disposition of that power by the City and County of San Francisco under conditions necessarily contemplating its resale by the company to consumers violates section 6 of the Raker Act. This question depends not on the charter or statutory powers of the company to dispose of electric energy whose disposition is legally subject to its control, but on the power of San Francisco to vest in the company any right to dispose of Hetch Hetchy energy at all where the disposition contemplated inevitably must take the form of a distribution of the power by the company among its consumer customers. Since the only authority which the City and County of San Francisco can have to dispose of the electric energy generated at Hetch Hetchy is derived from the Hetch Hetchy

grant, we must look at the provisions of that grant and of the Raker Act embodying it to see whether such a disposition is within or outside of the scope of the delegated authority. And looking at those provisions we cannot reasonably refuse to see that under the limitations on the authority of San Francisco to dispose of the Hetch Hetchy energy, expressly imposed in section 6 of the act San Francisco is prohibited from making any sale of that energy to a private corporation with a view to its resale by that corporation to its customers. See Solicitor's opinions of June 8, 1923 (M. 10228) and October 27, 1933 (M. 27615, 51 I. D. 316).

It has also been argued that this construction of the statute is improper because it forces on San Francisco municipal ownership and operation of distributing facilities, a result that was neither intended by nor within the power of Congress. That Congress did not intend to force municipal ownership and operation on San Francisco would, of course, be immaterial even if true. An explicit prohibition by Congress against the disposition of Hetch Hetchy power to a private corporation for purposes of resale is not to be defeated merely because its necessary consequence is to compel San Francisco to acquire and operate a distributing system of its own. Indeed, the natural conclusion is

that Congress intended to bring about the results flowing from the limitations which it imposed. A clear ex- [167] pression by Congress in the statute that it was not intended that San Francisco should acquire a municipal distributing system would, to be sure, serve to cast doubt on the validity of any construction of section 6 necessitating the acquisition of such a system by San Francisco. But there is nothing in the act which expressly or by legitimate implication can be taken to express such an intention. In the absence of any such expression of intention, there is no reason to refuse either to indulge the usual inference as to the legislative intention or to give effect to the claim of an unexpressed prohibition because failure so to do would lead to a consequence not specifically spelled out in the act.

The contention that Congress does not have power to compel the City and County of San Francisco to acquire and operate its own distributing system, while true, (see Uhl v. Badaracco, 199 Cal. 270), is quite beside the point. We are not concerned here with a direct attempt to force municipal ownership and operation on the City and County of San Francisco by a mandatory Congressional enactment. We are dealing merely with a specification by Congress of the terms and conditions under which it was willing to grant certain rights to San Francisco with respect to the generation and

utilization of electrical energy on the federally owned land embracing the Hetch Hetchy project. Congress, exercising its duly delegated legislative powers under the Constitution, had full authority to prohibit anyone, including San Francisco, from having any access at all to this land belonging to the United States. It also had full authority to dispose of that land or of the right to generate electric energy thereon under any conditions which it saw fit to impose.

This is exactly what was done by the Raker Act. San Francisco was granted certain rights on federally owned lands, subject to various conditions, among them those contained in section 6 prohibiting sale for the purpose of resale of any electric power developed on the land. The City and County was not compelled to accept the grant if it was unwilling to observe the limitations on which the grant was conditioned. When it accepted the grant, it acted voluntarily for the purpose of obtaining the benefits conferred, but by that same act it obligated itself to comply with the conditions imposed. Certainly San Francisco cannot continue to enjoy those benefits and at the same time repudiate the conditions on which their enjoyment, by the very terms of the grant, is made to depend. See Denver v. New York Trust Company, 229 U. S. 123, and also Trustees of Dartmouth College v. Woodward, 4 Wheat 518; Atkins v. Kansas,

191 U. S. 207; Heim v. McCall, 239 U. S. 175. The method by which San Francisco is to comply with those conditions is, of course, a matter to be controlled by the provisions of its charter. But in good faith it must exercise its powers to the full in order to carry out its obligations under the Raker Act, and, if necessary, even such an enlargement or amendment of those powers.

At the hearing on May 6 it was also sought to cast doubt on the meaning of section 6 by insisting that the [168] requirements contained in section 9, subsection (m), that certain designated amounts of power must be generated by San Francisco 'for municipal and commercial use' might be impossible to perform if sale for the purpose of resale were not permissible. Congress, however, provided, in section 9 (m), that lesser amounts of power might be generated if 'in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development.' Consequently, if no market for Hetch Hetchy power exists which may be served without a violation of the conditions imposed by Congress, including those contained in section 6 of the act, the Secretary may determine that the public interest does not require the generation of the prescribed amounts of power. Thus there is no conflict between the provisions of the act and no ambiguity concerning the meaning of section 6.

For these various reasons I have concluded that section 6 of the Raker Act prohibits the sale of Hetch Hetchy power for the purpose of resale and that this prohibition is legally valid. Since the meaning of the section is, in my opinion, clear and unequivocal, recourse to the legislative history of the Raker Act is neither necessary nor permissible. I may say, however, that an exhaustive examination of the history of the Raker Act when it was being considered by Congress unquestionably supports the interpretation which has been placed on section 6.

The contract of July 1, 1925, between the City and County of San Francisco and the Pacific Gas and Electric Company undoubtedly was drafted and executed with this section in mind and in the light of the suggestion contained in the Solicitor's Opinion of June 8, 1923, that a temporary arrangement be made for distributing power through the existing facilities of private concerns. Throughout this contract the language of consignment is used. However, true consignment is not a sale; it merely constitutes the consignee an agent of the consignor for a particular purpose—in this case to sell and distribute electric power. If there be a true consignment, the sale to the consumer is directly by the consignor. The consignee has not purchased the commodity himself and then resold it; he has merely negotiated a sale for and on behalf of the con-

signor. So if this particular contract is not of the latter type, if it does in fact contemplate a purchase of power from San Francisco by the Pacific Gas and Electric Company, it constitutes a violation of the Raker Act, for it also clearly contemplates that someone other than the Pacific Gas and Electric Company may ultimately purchase the power after it has once been delivered to that company.

The mere fact that the contract uses the language of consignment is not sufficient to establish its character. The substance of the instrument may be such as to make the transaction one of sale despite verbal twistings and turnings intended to cause it to appear to be one of consignment only. Standard Fashion Co. v. Magrane Houston Co., 258 U. S. 346; Vermont Marble Co. v. [169] Brow, 109 Cal. 236, 41 Pac. 1031; Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542. In my opinion, in substance this contract is one of sale—sale for the purpose of resale in violation of the statute.

In the introductory recitals of the contract there are alleged the desire and effort of the City and County to acquire a distributing system of its own and the necessity, in order to prevent waste of power and loss of potential revenue, of effecting a temporary arrangement whereby the company may distribute Hetch Hetchy power until the City and County can

acquire its own facilities. In the body of the contract it is agreed that San Francisco 'employs' the company temporarily to distribute electric energy, and that the entire output of the Moccasin Power House, the large unit on the Hetch Hetchy project, except power needed for construction of the project or needed to supply irrigation districts or other municipalities, shall be delivered and consigned to the company's substation in Newark. Based on the experience of the company in transmitting power from Newark to consumers in San Francisco, it is agreed that distribution losses amounting to 24 percent of the power delivered at Newark shall be deducted from the total amount delivered and that the company shall pay to the City and County 26.935 percent, and retain as compensation for its services 73.065 percent, of the average revenue received by it for the remaining 76 percent of the 'consigned' power. For the purposes of the contract it was assumed that the average revenue received by the company was 2.383 cents per kilowatt hour, a figure obtained by computation based upon the established rates for the year 1924. Any change in the established rates is to cause a proportionate change in the amount to be paid to the City and County. The contract then provides that, in case of the refusal, failure, or inability of the company to accept and distribute the power offered at Newark by the City

and County, the company shall make payment on the basis of the amount of power which the City and County could have delivered.

Because of the temporary character of the arrangement, the contract expressly provides for its termination at any time by either party on one day's notice. It also provides for 'immediate cancelation upon request or demand of the Secretary of the Interior of the United States, should he hold that in his opinion the agreement violates any provisions of the laws of the United States in general, or the Raker Act in particular'.

In speaking for the United States Circuit Court of Appeals for the Eighth Circuit concerning factorage contracts, which are agency contracts involving consignments, Judge Booth has aptly said:

> 'But in recent times, the real or supposed needs and exigencies of business and the ingenuity of business men and of their lawyers have evolved a class of contracts which have the earmarks of both sale contracts and factorage contracts. It is not always [170] easy to determine into which class a particular contract falls. If it becomes necessary to decide the question, all the court can do is to consider the various earmarks as disclosed by the contract, and the surrounding facts and circumstances, and determine, as best it can, into which class the contract should be

placed.' Marrinan Medical Supply, Inc. v. Ft. Dodge Serum Co., 47 Fed.(2d) 458, 460.

The difficulties surrounding the consideration of the present case are greater by reason of the character of the commodity which is the subject matter of the contract. Electric power is not a tangible, material thing. It can be stored only in quantities too small to be of significance in a sale or consignment contract. Because of its characteristics, power alleged to have been consigned by A to B cannot be segregated from other power owned by B; an accounting of the sales of the allegedly consigned power cannot be made by B separate from an accounting of the sales of his own power; the proceeds of the sales of the consigned power cannot be separated from the proceeds of the sales of B's own power; and any unsold surplus of the consigned power, even if it could be segregated, cannot for practical reasons be returned by B to A. Yet each of these enumerated things which cannot be done with respect to power is, if done, one of the characteristics which serves to distinguish a consignment from a sale. Because of the intrinsic nature of electricity, therefore, the concept of a consignment thereof presents something of an anomaly. It may be that electricity is not capable of consignment; at least it may not be possible of consignment to a company which distributes it, as does the Pacific Gas and Electric Company, by means of facilities

through which flows other power owned by it.

It is, however, unnecessary to decide this question on the facts that have been recited inasmuch as the contract possesses sufficient characteristics, in my opinion, to stamp it indelibly as one of sale for the purpose of resale.

It is fundamental in the law of agency and consignments that the activities of the agent or consignee, concerning the commodity entrusted to him by the consignor, are subject to the direction and control of the consignor. Yet neither this contract nor the course of action adopted by the parties under the contract indicate that San Francisco retains any power to direct or control the method of handling, distributing or selling Hetch Hetchy power after it is delivered to the Pacific Gas and Electric Company at Newark. In the absence of provisions forcibly compelling a contrary conclusion, this fact alone is sufficient to classify the transaction as one of sale for the purpose of resale rather than one of consignment for sale on behalf of the consignor. As incidents of this general proposition it may be said that mere freedom on the part of the alleged consignee in the making of sales to customers is sometimes considered almost conclusive in establishing that the transaction between the alleged con- [171] signor and consignee is one of sale (see In re Wayside Furniture Co., 67 Fed.(2d) 201; Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542), and that the

fact that the alleged consignee disposes of the commodity in the ordinary course of its retail trade to its usual customers indicates a sale rather than a consignment (see Public Utilities Commission v. Landon, 249 U. S. 236, 245).

Instead of provisions leading to a contrary opinion, this contract contains language forcibly compelling the conclusion that the transaction at issue is one of sale to and resale by the Pacific Gas and Electric Company. The company is bound to, and actually does, pay for all power delivered to it by San Francisco whether or not that power is resold. In commenting upon this feature of the arrangement the Pacific Gas and Electric Company in its April, 1934, issue of 'Progress', a regular publication issued by it, stated:

> 'The city simply turns the power on and leaves it to the P. G. and E. to dispose of it at a time when it has a large surplus of its own.
>
> The P. G. and E. is not like a private customer who can turn the power on and off when he wants to. It must take all the city's power as and when it comes and must pay for it whether it has a market or not.'

There can be no doubt that this requirement of the contract definitely fixes the character of the transaction. It is one of sale for the purpose of resale. The very essence of consignment is that the consignee, acting merely as the

agent of the consignor, effects a transfer of title to the consigned commodity directly from the consignor to the ultimate purchaser. The consignee is merely an instrumentality to effect that transfer and is not responsible to the consignor for the price of the commodity unless he has also acted as the consignor's agent for the collection of that price from the ultimate purchaser. In the latter case he is responsible to the consignor either for the money actually collected by him or for the price of the commodity sold whether or not he has collected from the consumer. Whether the one or the other of these liabilities exists depends on the terms of the consignment contract, but in no instance is the consignee directly obligated to pay for the consigned commodity if a sale of it is not effected by him. If he is obligated to pay for everything delivered to him, he is not acting on behalf of the alleged consignor in effecting a subsequent sale to consumers; he is acting on his own behalf. He has purchased the commodity and a subsequent sale is a resale. See Sturm v. Boker, 150 U. S. 312, In re Sachs, 31 Fed.(2d) 799; In re United States Electrical Supply Co., 2 Fed.(2d) 378; In re Thomas, 231 Fed. 513; Parlett v. Blake, 188 Fed. 200; Coweta Fertilizer Co. v. Brown, 163 Fed. 162; In re Galt, 120 Fed. 443; D. M. Ferry Co. v. Hall, 188 Ala. 176, 66 So. 104; Peoria Manufacturing Co. v. Lyons, 153 Ill. 427, 38 N. E. 661; Norwegian

Plow Co. v. Clark, 102 Ia. 31, 70 N. W. 808; Arbuckle Bros. v. Kirkpatrick [172] & Co., 98 Tenn. 221, 39 S. W. 3. Compare Ludvigh v. American Woolen Co., 231 U. S. 522.

Besides its admitted liability for power delivered, whether or not it is sold to consumers, the Pacific Gas and Electric Company has assumed in addition an absolute obligation to pay for power offered to it by San Francisco *even though the company does not accept it.* It would appear that here again the obligation is completely inconsistent with the theory of consignment. The reasoning in the cases set out above establishes the fact that one who is obligated to pay, whether or not he effects a sale to consumers, is a purchaser and not a consignee for the reason that any subsequent sale is of no benefit to the alleged consignor and, therefore, is not on his behalf. Certainly no subsequent sale of power by the company can be of benefit to San Francisco, and thus be made on its behalf, where a binding obligation to pay is imposed on the company by the mere offer of power at Newark whether or not the company accepts it. The contract, therefore, cannot be one of consignment. It can, however, be one of sale, giving the right to the company to resell any power which is received by it, for it is not inconsistent with the theory of a contract of sale that a commodity offered must be paid for even though it is not accepted. See Swift & Co.

v. Columbus Railway, Gas & Electric Co., 17 Fed.(2d) 46, in which substantially such a provision was enforced in connection with the sale of electric power.

In my opinion these significant characteristics of this transaction between San Francisco and the Pacific Gas and Electric Company conclusively disclose the nature of that transaction. It is a contract for the sale of electric power that expressly contemplates resale by the company to the consumers who are its customers.

This conclusion is not affected by the existence in the contract of the provision that San Francisco shall receive payment only for the power offered or delivered at Newark less the estimated amount of power lost in transmission from that point to the consumers, which amount is definitely fixed at 24 percent of the total. This provision, in effect, throws on San Francisco the burden of the estimated loss at any time before the power passes to the ultimate purchaser. The placing on the alleged consignor of the risk of loss is one of the characteristics of a true consignment. It is, however, not necessarily inconsistent with a sale, for buyer and seller are always free to provide by express agreement how, when, and by whom, the risk of loss is to be borne. Viewed in the light of the other characteristics of the agreement, even a complete and genuine assumption by San Francisco of the risk of loss would

not necessarily stamp the contract as one of consignment rather than one of sale. The assumption of loss would be, as it actually is, merely an ingredient in a formula used in determining the sale price. *A fortiori* is this so where, as here, there is no true assumption of actual loss, but merely an agreement upon an arbitrary and fixed percentage representing an approximate estimate of expected actual loss.

[173]

Likewise my conclusion that the transaction is one of sale for the purpose of resale is not varied by the fact that payment to the City and County of San Francisco is, according to the terms of the contract, not at a fixed price but on the basis of determined percentage of a variable retail electric power rate. A contract of sale may include any terms or any type of terms for payment on which the parties can and do agree. Consequently, this type of provision for payment cannot be said to change the transaction from one of sale to one of consignment, and it was so held in Public Utilities Commission v. Landon, supra. Furthermore, it is pertinent to point out that, according to the facts before me, the company has paid continually to the City and County the same rate per kilowatt hour of electricity despite changes in the rates charged to consumers effective in 1928 and 1930. Even though the rate changes may have been made at the request of the

company, these facts, establishing payment to the alleged consignor at a fixed price irrespective of variation in the price placed on sales by the alleged consignee, present another indication, although not a conclusive one, of a sale rather than a consignment. See In re Rabenau, 118 Fed. 471. Compare Dryden v. Michigan State Industries, 66 Fed.(2d) 950; McCollum v. Bray-Robinson Clothing Co., 24 Fed.(2d) 35. (That it is proper to look to the facts, such as those pertaining to the conduct of the parties under the contract, is established in such cases as Ludvigh v. American Woolen Co., supra; In re Thomas, supra; and Flanders Motor Co. v. Read, 220 Fed. [illegible].)

In the various briefs that have been submitted for consideration it has been suggested that a determination of the nature of the contract between San Francisco and the Pacific Gas and Electric Company should follow the decision of the Supreme Court of California in the case of Los Angeles Gas and Electric Corporation v. City of Los Angeles, 188 Cal. 307. In that case the court held that a contract between Los Angeles and certain power companies, whereby the city's power would be distributed through the facilities of those companies, did not violate a provision of the city charter prohibiting the sale of that power for the purpose of resale. In arriving at that conclusion the court laid stress on the fact that the

charter provision should not be construed as prohibiting a temporary arrangement for the distribution of power pending the purchase or construction of the city's own facilities.

The facts of the case, as they may be gathered from the opinion, are materially different from those in the case at issue. The Los Angeles contract contemplated the purchase by the city of the facilities then owned by the con- [174] tracting power companies and, in the words of the court, it was 'more in the nature of an agreement regulating the use and possession of property for the buyer and seller pending the consummation of the sale thereof.' In that contract it was provided that, during the interim prior to consummation of the sale, the city's power should be distributed through the companies' facilities and that, both before and after the consummation of the sale, the city should purchase from the companies 25,000 horse power of electric energy to augment its own supply.

In other words *all* the power in the lines of the companies belonged to the city. Also, the city acquired a measure of control over the operation of the facilities, and thus over the distribution of its power, by reason of its stipulated right to appoint two members of a board, composed of four members, whose duty it was to operate the distributing system pending the consummation of the purchase. The

companies, as compensation for the use of their property, were compelled to look to a fixed percentage of the amounts realized from the sale of power to consumers. The City, on the other hand, received as compensation, not the value of the power owned by it, whether sold or not, but the remainder of the amount realized from actual sales to consumers after the percentage accruing to the companies.

Inasmuch as it is the absence of such provisions as these and, some instances, the presence of contrary provisions, that justify my opinion that the San Francisco contract is one of sale for the purpose of resale, it is obvious that the decision of the court in Los Angeles case does not affect my conclusion that the Raker Act is being violated.

From the foregoing it must be evident that the provisions of Section 6 of the act expressly prohibit the sale of power for the purpose of resale, despite which San Francisco is actually selling Hetch Hetchy power for the purpose of resale. In such circumstances there is, in my opinion, no possible conclusion other than that San Francisco is not complying, either absolutely or "reasonably", as specified in section 9(u) of the act, with the requirements prescribed by Congress. The Raker Act is clearly being violated.

III.

Although the chief interest in the past, as at present, has centered around the distribution of the power generated at the Moccasin power plant and delivered to the Pacific Gas and Electric Company under the contract of July 1, 1925, there is another phase of this question to be considered. The City and County owns and operates, as a part of the Hetch Hetchy project, the Early Intake power plant that is located, according to the records of the General Land Office, in the Stanislaus National Forest and is dependent on the grant contained in the Raker Act. This plant is of small capacity and was constructed early in the [175] development of the project primarily for the purpose of providing the electricity necessary for the construction of the remainder of the works. It appears that some power in excess of that required for the construction of the project was generated at this plant and that, by an order dated September 18, 1918, the Power Administrator for the State of California directed that the surplus be delivered to the Sierra and San Francisco Power Company to alleviate the power shortage occasioned by activities essential to the effective carrying out of the undertaking by the United States in connection with the World War. Pursuant to that order power from the Early Intake plant was sold to company named, and subsequently to its lessee,

the Pacific Gas and Electric Company, at the flat rate of one-half cent per kilowatt hour.

There is no written contract under which this power is sold to the Pacific Gas and Electric Company. From the facts reported, however, there appears to be no doubt that an absolute sale at a fixed price is effected. Nor does there appear to be any doubt that the power is resold by the company to its regular customers in the Tuolumne Circuit, which does not include San Francisco itself. Since the purpose of the sale of this power by the City and County clearly includes resale by the company for commercial purposes, it is manifest, on the basis of the prior discussion, that such an arrangement constitutes a violation of the statutory prohibitions in the Raker Act.

IV.

Although they are not necessary to the legal determination of the question whether the existing arrangements for the distribution of Hetch Hetchy power constitute a violation of the provisions of the Raker Act, and although I have already given and supported my opinion on that question, certain items in the legislative history of the act and certain facts attendant upon the performance of the contract of July 1, 1925, by San Francisco and the Pacific Gas and Electric Company have suffi-

cient general significance to justify calling them briefly to attention.

An examination of the legislative history of the act makes it manifest that Congress, in the enactment of section 6, meant to eliminate completely any private monopolistic control over the water or power produced from the Hetch Hetchy project, and that the Pacific Gas and Electric Company was specifically considered as one of the monopolistic concerns to be excluded. Of the numerous significant facts found in the legislative history only a few need be referred to here.

The Committee on Public Lands of the House of Representatives incorporated in its report (House Report No. 41, 63d Congress, 1st Session) a complete analysis of the bill which, with amendments not now pertinent, subsequently was enacted as the Raker Act. In commenting on section 6 of the Bill it was stated: [176]

> 'This provision, acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco.' (p. 11)

This report and explanation of the bill was also included, by reference, in the report of the Committee on Public Lands of the Senate (Senate Report No. 113, 63d Congress, 1st Session).

A clear, concise statement in explanation of this section of the bill was made to the Senate by Senator Pittman, one of its sponsors before that body:

'It provides absolutely that neither this water nor this power can ever fall into the hands of a monopoly.' (Cong. Rec., vol. 50, p. 5478.)

Of particular significance are the statements made on the floor by Senator Norris in the course of an extended speech in support of the bill:

'* * * This bill is not giving to a private corporation any power. It is giving to the people of the locality of San Francisco the right to use a cheap power when it is developed. To my mind, it is the very highest type of conservation. Here for ages this stream has been running down from the mountains, even destroying property, without doing man any good, and this proposition is to harness that power and to put it to public use not to give it to a private corporation. Why do we want to develop water power? Will we give it to the public or to a private individual or corporation?

Here is an instance where we are going to give it directly to the people, if we pass this bill. It is going to come into competition with power companies and corporations that have

or will have, if this bill is defeated, almost a monopoly not only in San Francisco but throughout the greater portion of California.' (Cong. Rec., vol. 51, p. 343.)

* * * * * * *

'So we have a maze of corporations here. When you sum them all up you will find that they own practically all of the hydroelectric power of the State of California, and this bill, if passed, will bring into competition with them one of the greatest units for the development of power that has ever been developed in the history of the world. It means competition.

[Quoting from a report of the Bureau of Corpora- [177] tions concerning the development of water power in California].

'(It will be recalled that the Pacific Gas & Electric Co. controls directly or influences nearly 200,000 horsepower developed and under construction and at least 100,000 horsepower undeveloped. But as large as these holdings are, that alone does not by any means give this company a monopoly of the water power in the territory served. There is undoubtedly a vast volume of undeveloped power in this region that is not owned by it. This lack of ownership of practically all the power in the territory where it operates has not, however, prevented the Pacific Gas & Electric Co. from establishing a fairly effective monopolistic market condition.

"'The operations of this company and its subsidiaries cover the north central portion of California for about 225 miles from north to south and 125 miles from east to west. This territory embraces at least 30 counties, containing about 38,000 square miles. San Francisco, the largest city in the State, Sacramento, and other important cities are in this territory.'" (Cong. Rec., vol. 51, p. 344).

* * * * * * *

'Mr. President, I could go on at great length if I were physically able to do so, and develop those propositions and trace down in detail those various corporations, but I think I have gone far enough to show that if the power of the Hetch Hetchy is developed it will come into direct competition with what a sworn official of the Government says it is a monopolistic control of the hydroelectric power of California.' (Cong. Rec., vol. 51, p. 345):

* * * * * * *

"* * * The people who ride on street cars, the people who use electric lights, the people who are now using gas, those who eventually will use coal for purposes of heat, and those who use water for washing purposes will all receive all the benefit there is in this legislation without any rake-off by any corporation or monopoly.' (Cong. Rec. vol. 51, p. 347.)

From these excerpts the intent of Congress is clear. Yet the Pacific Gas and Electric Company, now having a complete monopoly in San Francisco by reason of the acquisition in 1930 of the properties of the Great Western Power Company, receives the entire output of the Moccasin Power plant, which produces almost all of the power gener- [178] ated on the Hetch Hetchy project. Instead of competing with that power, the company has control of it. Consumers in San Francisco must purchase their power, whether or not it is Hetch Hetchy power, from the Pacific Gas and Electric Company. Even the City and County of San Francisco purchases from the company the power necessary for street lighting and other municipal uses.

It should especially be noted that the Pacific Gas and Electric Company, according to statements contained in its annual reports of 1930 and 1933 to the California Railroad Commission, expended some $45,500 in working for the defeat of the proposed bond issues submitted to the voters of San Francisco on August 26, 1930, and November 7, 1933. Had those bond issues been approved, Hetch Hetchy power, or a part thereof, would have been distributed by San Francisco itself in conformity with the mandate of Congress.

For the reasons stated in parts II and III hereof, it is my opinion that the provisions of

section 6 of the Raker Act are being violated by reason of the sale of Hetch Hetchy power to the Pacific Gas and Electric Company for the purpose of resale.

I have been reluctant to arrive at this conclusion but I have no other option under the law and the facts. However, there are two methods by which San Francisco may follow the clear intendment of the law and at the same time enjoy all the benefits that would accrue to it under the Raker Act. A general bond issue to finance a distribution system may be adopted by a two-thirds vote of those participating in the election; or the charter of the city may be amended by a majority vote so as to permit the issuance of revenue bonds which will require the approval of only a majority of those voting at the election.

Who can doubt that, conscious of both its obligations and its opportunities under the Raker Act, San Francisco will rally under its splendid civic leadership as it has done so many times in the past and by its vote declare itself to be on the side of carrying out the solemn obligation with the United States Government that it undertook when it accepted the benefits of the Raker Act?

If the contract under discussion was ever justified as a measure of temporary expediency, that justification can no longer be pleaded in its defense, after such a lapse of time as this case disclosed. Nor can San Francisco be heard to

urge as an excuse for its continued failure to carry out a clear and binding obligation disabilities that the citizens can overcome if they have the will so to do.

(Sgd) HAROLD L. ICKES,
Secretary of the Interior." [179]

Counsel for the plaintiff thereupon offered in evidence a certificed copy of a letter dated August 24, 1935, from Harold L. Ickes, Secretary of the Interior, to Angelo J. Rossi, Mayor of San Francisco, transmitting to him a copy of the aforesaid Opinion. Said letter was received in evidence, marked

"U. S. EXHIBIT No. 12";

it reads as follows:

"The Secretary of the Interior, Washington,
August 24, 1935.

"My dear Mr. Mayor:

"I take pleasure in sending you herewith a mimeographed copy of my opinion in re the contract between San Francisco and the Pacific Gas and Electric Company in relationship to the Raker Act.

"Sincerely yours,
(Sgd) HAROLD L. ICKES,
Secretary of the Interior.

"Hon. Angelo Rossi, Mayor, San Francisco, California."

Counsel for the plaintiff then offered in evidence three documents, the first, a certified copy of a letter

dated March 11, 1937, from Harold L. Ickes, Secretary of the Interior, to the Board of Supervisors of the City and County of San Francisco; the second, a certified copy of letter dated March 16, 1937, from J. S. Dunnigan, Clerk of the Board of Supervisors of the City and County of San Francisco to Harold L. Ickes, and the third, a telegram dated March 30, 1937, from the Board of Supervisors of the City and County of San Francisco, (by Warren Shannon, President) to Harold L. Ickes, Secretary of the Interior. Said documents were received in evidence as one exhibit and marked

"U. S. EXHIBIT No. 13".

In the order in which they have been listed above, they read as follows:

"The Secretary of the Interior,
Washington, Mar. 11, 1937.

"The Board of Supervisors, City and County of San Francisco, City Hall, San Francisco, California.

Gentlemen:

I have been advised that on March 9 the electors of [180] San Francisco rejected Charter Amendment No. 1 which was designed to authorize the issuance of revenue bonds for the acquisition and operation of a municipally owned electric distribution system. It is my understanding that had that charter amendment been enacted the City and County of San

Francisco would have undertaken a program for the distribution of electric energy generated on the Hetch Hetchy project in accordance with the requirements of Section 6 of the Raker Act.

I have already advised you of my determination that San Francisco is now and for many years past has been violating the provisions of section 6 of the Raker Act by selling Hetch Hetchy energy to the Pacific Gas and Electric Company for distribution to consumers. Unless definite assurance can be given to me within 15 days after receipt of this letter that San Francisco will cease its violation of the provisions of the Raker Act, I shall refer this matter to the Attorney General of the United States with my request that appropriate action be taken in the courts to effectuate the provisions of the statute.

Sincerely, yours,

(Sgd) HAROLD L. ICKES,

Secretary of the Interior.

Copy to : Hon. Angelo J. Rossi, Mayor of San Francisco, City Hall, San Francisco, California.

John J. O'Toole, Esq., City Attorney for the City and County of San Francisco, City Hall, San Francisco, California."

"City and County of San Francisco,
Board of Supervisors,
Clerk's Office, Room 235, City Hall

March 16, 1937.

Honorable Harold L. Ickes,
Secretary of the Interior, Washington, D. C.

Dear Mr. Secretary:

Your letter March 11, 1937 re: Distribution of Power produced on the Hetch Hetchy Project, received March 15, 1937 and presented to the Board of Supervisors on that date.

The Board of Supervisors informs you that earnest and immediate attention will be given to the letter and you will be informed of the results at the earliest moment.

Respectfully,
Board of Supervisors, San Francisco.
J. S. DUNNIGAN,
Clerk." [181]

"March 30, 1937.

Honorable Harold L. Ickes,
Secretary of the Interior,
Washington, D. C.

Dear Sir: Referring to Your Letter March Eleventh Received by Board of Supervisors of San Francisco March Fifteenth Nineteen Thirty Seven Re Alleged Violation of Section Six of Raker Act by Disposing of Hetch

Hetchy Energy Through Pacific Gas and Electric Company for Distribution to Consumers and Advising That Unless San Francisco Does Not Cease This Method of Power Distribution You Will Refer Matter to Attorney General of United States With Request That Appropriate Action Be Taken in Court to Determine Whether Provisions of Raker Act Are Being Violated Board of Supervisors of San Francisco Does Hereby Request You to Proceed to Lay Matter Before the Attorney General With Understanding That the City of San Francisco Will Be Given Opportunity to Present Its Case Before Him This Board Believes That the Agency Contract Under Which City Is Now Acting Is Fully in Accord With the Raker Act and Believes That the Long Pending Controversy Can Best Be Determined by the Attorney General or by the Court This Message Is Sent You With the Hope That a Final Conclusion May Be Reached as to San Francisco Position With Regard to Its Compliance With Terms of the Raker Act.

BOARD OF SUPERVISORS CITY AND COUNTY OF SAN FRANCISCO
By WARREN SHANNON
President of the Board."

Counsel for the plaintiff thereupon offered in evidence a certified copy of a letter dated April 2, 1937, from the Secretary of the Interior to the

Attorney General of the United States requesting the commencement of the present suit. Counsel for the defendant objected to said letter upon the ground that it was incompetent, irrelevant and immaterial and self-serving and asked that, if it be admitted in evidence, it be limited to the sole purpose of showing that the Secretary of the Interior had requested the Attorney General to commence this suit. Thereupon, counsel for the plaintiff stated that the letter was offered to show a compliance by the plaintiff with the provisions of Section 9(u) of the Raker Act. The Court thereupon overruled the objection of the defendant and admitted said letter in evidence. Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are herein designated as Ruling and Exception No. 7. [182]

Said letter was marked

"U. S. EXHIBIT NO. 14"

It reads as follows:

"The Secretary of the Interior,
Washington,

April 2, 1937.

The Honorable The Attorney General.

My dear Mr. Attorney General:

On July 1, 1925, the City and County of San Francisco entered into a contract with the Pacific Gas and Electric Company, under which contract San Francisco has continuously since

that time delivered to the utility company almost the entire power output of the Moccasin plant on the Hetch Hetchy Project. The Moccasin plant is the primary power generating facility owned by San Francisco and operated in connection with its water and power project, known as the Hetch Hetchy Project, located largely within the Yosemite National Park and the Stanislaus National Forest. The project also includes a smaller power plant known as the Early Intake plant, the output of which is also delivered to the Pacific Gas and Electric Company under an informal and unwritten agreement.

San Francisco was granted the right to construct the Hetch Hetchy Project in the Federal areas involved by the act of Congress of December 19, 1913 (38 Stat. 242), commonly known as the Raker Act. In that statute numerous conditions are placed on the grant, among them being one which prohibits the sale of power generated by the grantee on the project for the purpose of resale by the purchaser, except in certain designated instances. That condition is contained in Section 6 of the act and is worded as follows:

"'That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the elec-

tric energy sold or given to it or him by the said grantee: * * *.'

Immediately after the execution of the contract of July 1, 1925, the question was raised as to whether it constituted a violation of the condition expressed in Section 6 of the act. The treatment of that question I need not state here: it is explained in detail in my opinion of August 24, 1935, two copies of which are attached. In that opinion I have also outlined the history of that question during the ensuing ten years, during which it was repeatedly raised and discarded. When the matter came to my attention, I determined that far too much procrastination had already existed and I notified the officials of San Francisco that a final determination of the question must be made. Pursuant to that notice, a formal hearing was afforded the officials of San Francisco and other interested parties by me on May 6, 1935. Thereafter various briefs and informal arguments were filed. After full and [183] detailed consideration of the statute, the facts and the arguments, I rendered my decision of August 24, 1935, holding that the contract of July 1, 1925, violated the provisions of the Raker Act as did the informal arrangement whereby power from the Early Intake plant was delivered to the Pacific Gas and Electric Company.

Thereafter the officials of San Francisco formally submitted for my consideration sev-

eral plans for future disposition of Hetch Hetchy power. After hearing and careful consideration, I ruled on April 22, 1936, that none of those plans would constitute compliance with the provisions of the Raker Act, although I indicated that an additional, unperfected plan informally submitted, if completed and effectuated, would apparently be in conformity with the statutory requirements. As a result of that tentative approval, the officials of San Francisco perfected what they designated as Plan No. 7, and on December 4, 1936, submitted it for my final consideration. That plan provided for acquisition of a distributing system by San Francisco and for municipal distribution of power direct to consumers. On December 16, 1936, I notified the city that, if effectuated, the plan would, in my opinion, constitute compliance with the provisions of the Raker Act.

To provide funds necessary to finance Plan No. 7, the Board of Supervisors of San Francisco presented to the electors a charter amendment authorizing the issuance of $50,000,000 of revenue bonds. On March 9 of this year the electors rejected that charter amendment. After receipt of information concerning the bond election, and on March 11, I wrote to the officials of San Francisco stating that I would request the Attorney General to institute suit to effectuate the provisions of the

Raker Act unless definite assurance were given within fifteen days from receipt of the letter that the violation of the provisions of Section 6 of the Raker Act would cease. I have received no such assurance, but, instead, I have received a telegram advising me that no action will be taken and that San Francisco desires the opportunity to test the matter in the courts.

In these circumstances, and pursuant to Section 9(u) of the Raker Act, I hereby request that you institute suit in the Federal Court to enforce the provisions of the act. In my opinion the least that can be done is to secure an injunction against the further disposition of power to the Pacific Gas and Electric Company under the existing arrangements between that company and the City and County of San Francisco.

Considering the importance of this matter and the undue length of time during which action has been deferred, I request that suit be instituted at the earliest possible date. This Department stands ready to render every possible assistance in the institution and prosecution of this litigation. [184]

For your assistance I am enclosing copies of the following documents in duplicate:

(1) Contract of July 1, 1925, between the City and County of San Francisco and the Pacific Gas and Electric Company. (The original copy of this document is in the hands of the parties to it.)

(2) Transcript of hearing held on May 6, 1935, concerning the legality of San Francisco's disposal of Hetch Hetchy power.

(3) Brief of City Attorney O'Toole supplemental to the hearing of May 6, 1935.

(4) Brief of Robert M. Searls filed on behalf of the San Francisco Chamber of Commerce and other organizations.

(5) The decision of August 24, 1935.

(6) Transcript of hearing held on January 28, 1936, concerning the newly submitted plans for distribution of Hetch Hetchy power.

(7) Brief of City Attorney O'Toole supplemental to the hearing of January 28, 1936.

(8) Decision of April 22, 1936, rejecting the plans formally submitted and considered in the hearing of January 28, 1936.

(9) Plan No. 7, the letter submitting the plan and my letter approving it.

(10) My letter of March 11, 1937, allowing fifteen days in which to give assurance that the violation of the provisions of the act would cease.

(11) Telegram received March 30 advising that San Francisco desires a test of this matter in the courts.

Sincerely yours,

HAROLD L. ICKES

Secretary of the Interior."

W. G. VINCENT,

a witness for the plaintiff, was thereupon duly sworn and testified as follows:

Direct Examination

I am Vice-President and Executive Engineer of Pa- [185] cific Gas and Electric Company. I am familiar with the terms of the contract ("U. S. Exhibit No. 6") between our Company and the City and County of San Francisco, which provides for the delivery of a certain quantity of electric energy developed by the City in its Moccasin Power Plant to our station at Newark, I, myself, have not, since the inception of the contract, been in charge of seeing whether or not the terms of the contract were carried out. I have not been in direct charge of the matter at any time, although I am familiar with the general conditions of the delivery of electric energy under the contract. I know in a general way what has been done by our Company and the City under the contract, from the records of our Company and my familiarity with the matter since the contract was executed, but I have not followed the details of the operation. At the present time, the power generated by the City at the Early Intake Plant is being turned over to our Company in addition to the power generated by the City at the Moccasin Plant and contemplated in the contract. The power gen-

(Testimony of W. G. Vincent.)

erated at the Early Intake is a little less than three per cent of the power generated at the Moccasin Plant. The power from the Early Intake Plant is being paid for by our Company under the same terms as those prescribed in the Contract.

There is no way in which our Company can distinguish between the power from the Early Intake Plant delivered to it at Newark, and that from the Moccasin Plant delivered to it at Newark, except in the matter of quantity. All the power from the Early Intake passes through the Moccasin Creek Power Plant; all the power is delivered to us together. I am not familiar with the maps which you show me ("Defendant's Exhibit A") and "U. S. Exhibit No. 5"), but I can give a general statement of the Hetch Hetchy Project with its power plants and transmission lines, aqueducts and so forth.

The water is stored in the main reservoir of the City and County of San Francisco, in the Hetch Hetchy reservoir indicated in red on "Defendant's Exhibit A". Also, there is water stored in Lake Eleanor. The water from the Tuolumne River flows along here as shown on the map. (Defendant's Exhibit A"). The water released from the storage reservoir flows down the river to a point designated as "Early Intake". At this point, the water enters the aque-

(Testimony of W. G. Vincent.)

duct system of the City and flows through tunnels to the forebay or regulating reservoir at the end of the tunnel above the power house. The power house is downhill from the reservoir. The Moccasin Creek Power Plant is shown here on the map ("Defendant's Exhibit A"). The power is generated at the Moccasin Creek Power Plant and sent out over a two-circuit steel tower line at 110,000 volts pressure to the Newark substation of the Pacific Gas and Electric Company, which is located about 40 miles from San Francisco. The Early Intake Power Plant is located at the point on "Defendant's Exhibit A", which is marked "Early Intake." My understanding is that the water [186] used through that plant is the water diverted from Cherry Creek and released from the Lake Eleanor Reservoir. That power is generated at the Early Intake Plant and brought down over a transmission line of the City to the Moccasin Creek Plant. From that point it is transmitted to Newark over the same circuits that carry the power generated from the Moccasin Creek Plant.

The power from the Early Intake passes through the Moccasin plant and thence on to Newark and there is no way of differentiating it from the power generated at the Moccasin plant except in the matter of quantity.

(Testimony of W. G. Vincent.)

All the power delivered by the City of Newark is measured before it passes on to the Company's bus bar for distribution into our pool. In a general way it is correct to state that all the different demands we have throughout the state; all the different places we sell or distribute power, are so connected that our power distribution is one large pool, and that all power supplied from any source including the Moccasin power goes into that pool, except that physically the pool is not centered at Newark or any one place. The pool is not a pool in the sense that all the power comes in at any one place; power comes in and is used at various points on the line and there is no one place where all the power is centered or passes through. With reference to demand, the power that passes into the pool is regulated by our load dispatcher, who is in touch with the power supply at all times and with the demands made upon that supply.

The electric system of the Pacific Gas & Electric consists of a network of high-voltage transmission lines, and also low-voltage transmission lines, all of which, as a system proposition, are inter-connected and operate as a unit. These lines extend from Bakersfield, on the south, to Delta, north of Redding. The Pacific Gas & Electric Company has many sources of power other than its own plants

(Testimony of W. G. Vincent.)

and the Moccasin Creek plant, such as power purchased from various companies, and power from the irrigation districts which feed into that network of high-voltage transmission lines, and all of its power system is operated as a unit, under a load dispatcher in Oakland, who is constantly in touch with the power plants as the source of power on the system, and as the requirements of the load vary, the load dispatcher controls the supply of power to that network of high-voltage lines by connecting up more plants, or increasing the load on plants which are already supplying power, and in that way he keeps the balance between the requirements and the amount of energy being supplied into the transmission network.

In the contract of July 1, 1925, it is provided that delivery of power from the Moccasin Creek plant shall be made at a monthly load factor of 75 percent. The method of control by the company of the output of power from the Moccasin plant differs from its control of the power received from other plants in this respect. [187]

In other words, we regulate our own plants in accordance with their capacity, but under the contract, the Moccasin Plant is regulated in accordance with a seventy-five per cent monthly load factor. In Company operated

(Testimony of W. G. Vincent.)

plants there are no load factor restrictions as to operation.

The power that comes to the station at Newark is measured by meters installed at Newark before it passes into the pool and it is upon the meter readings that the City is compensated by our Company for the power delivered at Newark. The reading of the meters is governed by the amount of the power that comes over the line to them, which, in turn, is governed by our load dispatcher within the limitations of the contract, and by the city's operating conditions which may obtain at the time in the plant. After the power passes through the meters and is measured, it goes into the 110,000 bus bar, at Newark. From that time there is no method of differentiating the power received from the City from any other power supplied by that particular line.

We do not bill our customers in San Francisco as having received power generated by the City at the Early Intake Plant or the Moccasin Power Plant. We have no means of identifying the source of the power. Our San Francisco customers are billed under the name of Pacific Gas & Electric Company, the same as our municipal customers elsewhere. Our account with the City is based entirely upon the meter readings at Newark, as the contract provides. The City, itself, is a customer of our

(Testimony of W. G. Vincent.)

Company. There is no differentiation between the City and any other municipal consumer or municipal corporation consumer with respect to the energy supplied to it. The City is billed for the power just as any other municipal consumer is billed and the rate it pays is fixed on the same basis as that paid by any other municipal corporation consumer.

I am familiar with the provisions of paragraphs 4 and 5 of the contract of July 1, 1925 ("U. S. Exhibit No. 6") wherein it is stated that it is assumed that the average revenue received by the Company from consumers in San Francisco during the year 1924 was 2.383 cents per kilowatt hour and that the City shall receive for the energy consigned and delivered by it, to the Company, at Newark, 26.935% of 2.383 cents per kilowatt hour. The figure 2.383 is the average revenue per kilowatt hour for all electric energy sales of the Company in San Francisco in the year 1924.

I am familiar with paragraph 8 of the contract of July 1, 1925. I have prepared a computation of the revenue per kilowatt hour of the Company in the City and County of San Francisco on an annual basis for each year since the contract was entered into up to and including the present year, which includes an estimate of what the revenue will be for the present year based upon our past experience

(Testimony of W. G. Vincent.)

on the established rates: For the year 1935, the average revenue of the Company per kilowatt hour [188] was 2.361 cents; for 1936, 2.238 cents; and for 1937, with three months' estimated, will be 2.113 cents. In the three years mentioned, beginning with 1935, through 1936 and ending with 1937, each year has shown a lesser average revenue per kilowatt hour in San Francisco, than the preceding year and for each of the three years, the average return was less than the rate of 2.383 cents used in the contract of July 1, 1925 as the basis of return to the City.

In each of the three years 1935, 1936 and 1937 there have been reductions in the established rates of the Company for the sale of electric energy in San Francisco. There was temporary reduction in 1935; a permanent reduction in 1936, and a permanent reduction in 1937. The reduction in 1935 was only for the use in excess of the previous years' use without making a definite change in the schedule. In 1936 and 1937 there was a definite lowering of the schedules.

The temporary reduction in 1935 was $300,000.00 in San Francisco. In 1936, the reduction approximated $1,200,000.00 and in 1937 will approximate $1,213,000.00. I have not made any computation of what the difference in return to the City would be on the basis of

(Testimony of W. G. Vincent.)

2.361 per kilowatt hour (which was the average return of the Company for the year 1935 in San Francisco) and the figure of 2.383 (which is used in the contract of July 1, 1925, as the basis of return to the City under the contract) nor have I made any such computation for the year 1936 in which the average revenue per kilowatt hour received by our company in San Francisco was 2.238 as against the figure 2.383 used in the contract. I have not here any computations showing what the difference in the return to the City contemplated under paragraph 8 of the contract would have been, if instead of using the figure 2.383, as used in the contract, we had used the figure 2.361 for the year 1935; the figure 2.238 for the year 1936, and the figure 2.113 for the year 1937. There has not been any difference in the compensation paid to the City as the result of the three successive rate reductions in the years 1935, 1936 and 1937.

The amount paid to the City under the contract of July 1, 1925, is a product of three factors which are set up in the contract; the average rate of 2.383 cents per kilowatt hour is one factor; the 73.065 per cent of the revenue, retained by the company is another factor, and the estimated loss of 24 per cent specified in the contract is the third factor. The money received by the City is the product of these

(Testimony of W. G. Vincent.)

three factors, the average rate per kilowatt hour multiplied by 76 per cent, and by 26.935 per cent which the City is to receive. Any readjustment of one factor would necessarily bring up the question of a readjustment of the other two factors.

The contract is subject to cancellation on 24 hours' notice by either party. It is a temporary contract. A contract of that nature is not a permanent contract. If [189] one party wants consideration of one factor favorable to it the other party would certainly want a consideration of the other factors, unless they were bound by those particular factors for a term of years.

I think the contract has been enforced except for that technical provision in paragraph 8 (of the contract) relative to the use of the Company's average revenue per kilowatt hour, as the basis of the return to the City.

I think it is correct to say that in the year 1936 the difference between the average revenue per kilowatt hour actually received by our Company and that set up in the contract would have effected a change in the amount paid to the City of better than five per cent of that amount. That is to say, if we had used the figure 2.238 as the basis of return rather than the figure 2.383 as set up in the contract, the difference in the return to the City would have

(Testimony of W. G. Vincent.)

amounted to about five per cent or near $100,000.00. For the year 1937 the difference would be better than eleven per cent, because the figure of 2.113 is more than eleven per cent less than the figure 2.383 which is the basis upon which payment is being made under the contract. For the year 1937, therefore, the difference would amount to about $200,000.00. There has been no change in the base, however. The City is still being paid on the basis of 2.383, as the average return per kilowatt hour received by the Company in San Francisco. Apart from the rates charged to consumers, as established by the Railroad Commission, no control is exercised over our company's distribution of the energy consigned by the City to it at Newark, so far as rates, consumers, places of use, or anything of that sort is concerned.

Cross Examination

We have a line connecting close in to the Early Intake Plant, whether at Groveland or not, I don't know. I know that we took the power from the Early Intake Plant directly from a local line through there. I am not now familiar with the conditions as they existed during the construction of the Hetch Hetchy project. My information, however, is that the Early Intake Power was delivered into the Sierra and San Francisco Power Company's

(Testimony of W. G. Vincent.)

system beginning in 1918 over a line which belonged to us at that time. I do not know whether that power comprised all the power generated at Early Intake or only a surplus. We had no connection with the San Francisco Power Company in 1918. It was a short line that came from the Early Intake and we were negotiating to sell it to Sierra and San Francisco Power Company. I don't know what the conditions were at that time. Of the total amount of power received by our Company from the City's line at Newark approxim-

[190] ately three per cent comes from the Early Intake Plant. I do not know what prior uses the City makes of the power from the Early Intake Plant. I only know how much of the power we receive from the City at Newark comes from Moccasin Power Plant. It is my information that about 13,000,000 kilowatts came in 1936 and a little under 12,000,000 until October of this year.

The San Francisco load taken from the Newark sub-station is always more than the total contract requirements on the seventy-five per cent load factor at the present time. The Moccasin Creek Power and the Early Intake power comes from the City's line to our bus bar at the Newark station. From those bus bars we have four 100,000 volt lines that go direct to San Francisco and under normal oper-

(Testimony of W. G. Vincent.)

ations at every instant of time, the amount of power being drawn into San Francisco exceeds the amount being delivered to us by the City. Bus bars is an electrical term for copper bars fed by a number of circuits. A number of circuits take power off the bus bars. The amount of power going off of the bus bars to San Francisco is more than the amount of power than comes on to the bus bars from Moccasin Creek, in normal operations.

The quantity of electric energy which the Pacific Gas & Electric Company delivers to San Francisco consumers' meters is always more than the amount which the City turns in to the Pacific Gas & Electric Company under the terms of its contract. So far as quantity goes, the Company could deliver all the energy that the City produces at Moccasin Creek and still have to supply more energy from its own source in order to meet the consumers' demands in San Francisco.

The City of San Francisco consumes a certain amount of electrical energy in its municipal railways and for lighting streets and public buildings.

The energy brought in from the 110,000 volt lines from Newark goes to two sub-stations just outside the City limits of San Francisco, where it is converted through transformers, that is transformed and regulated to a lower voltage of 11,000 volts. At 11,000 volts, it is

(Testimony of W. G. Vincent.)

distributed to some 18 sub-stations in San Francisco, through 11,000 volt lines largely underground, and in those sub-stations it is then transformed into lower voltage and sent out through distributing lines to the city. It is converted to direct current of 500 volts for Municipal Railway use. For street lighting it is converted to different voltages by various equipment in the sub-stations and sent out over the street lighting circuits.

Unless we billed this current to the City, separately, we would have no way of accounting for these changes in characteristics and the line losses and everything else. [191] We could not say that any particular energy came from Newark and then account for changes in its characteristics until it got to the City meters, in San Francisco. I do not think you could practically trace the particular amount of energy from sales to consumers or to the effect of the changes in characteristics. We would have to bill it as current having the characteristics of our San Francisco energy. In respect to the matter of accounting convenience and billing it would certainly be more confusing to try to make adjustments with the City's billing schedule on account of the power received at Newark than to bill the City as we do.

The contract between the City and our Company is a day to day contract, terminable on

(Testimony of W. G. Vincent.)

twenty-four hours' notice from either party to the other.

Under the contract the return to San Francisco is computed as follows:

The amount of energy which the city delivers to us at Newark is multiplied by 76 per cent; that allows for the loss of 24% from Newark to San Francisco, and to the consumers' meters as set forth in the contract; so, multiplying the number of kilowatt hours received at Newark by 76 per cent, gives us the number of kilowatt hours that we estimate that the ompany delivers for the city's account to the consumers' meters. Then we multiply that number of kilowatt hours by the average rate of 2.383 received by the company in San Francisco, which produces an amount of money, of which the company retains 73 per cent and gives the City 27 per cent.

The 73 per cent plus retained by the company covers the cost to the company in transporting the power from Newark to San Francisco, which it does over its own line, in converting the power at the limits of San Francisco to lower voltage, in distributing power through San Francisco to its cable system, and then to the sub-stations, and out to the distributing line to the consumers' meters; for the operations of this system, the maintenance of this system, a reasonable return of compensation for the use

(Testimony of W. G. Vincent.)

of the property, and also for supplying steam standbys and peak load service in connection with the San Francisco load, because the city energy is only about one-half of that required to supply the San Francisco load. The energy which is delivered at Newark is not sufficiently reliable to serve a community like San Francisco, so the company maintains steam plants which are ordinarily known as stand-by plants. These plants serve two functions; one is to supply energy at times when there may be a break in the transmission line coming in, or some accident to the power plant, and the other function is to supply power at times when the demands in San Francisco, in other words, what we call the "peak load", are in excess of the incoming power over the transmission system. In the evening, in the winter time, about five o'clock, everybody starts turning [192] on the lights and we have what is called a "peak load", and in San Francisco at the present time, the peak load would be about 225,000 kilowatts. Now, the maximum amount of power we can receive here from Moccasin Creek is about 67,000 kilowatt hours, so that the additional power must be supplied by the company. These are the services which the company renders in supplying and distributing this energy for the city.

(Testimony of W. G. Vincent.)

I include the cost of billing the consumers and collecting bills in the cost of operation and maintenance of the system, in which I include all the costs incident to the operation of the system, including reading meters; billing, collecting and accounting and operations of that character which go along with the supplying of energy to the consumers.

In response to a question by Mr. Licking, on direct examination, I stated that in the last three years there has been a reduction to 2.361 in the average rate of return to the Company in San Francisco, and that that figure is .022 cents per kilowatt hour less than the average return of 2.383 used in the contract, as the basis of return to the City. I, also, stated that this difference amounted to a five per cent reduction. I desire to correct that testimony. In giving it I was a little bit confused as to what year the five per cent applied to. I think my calculation was that it was ten per cent or eleven per cent in 1936. It was one per cent in 1935 and ten per cent in 1937.

I have recomputed the percentages for the three years; for the year 1935 I now make the return one per cent below that specified in the contract as the average rate of return; for the year 1936 I now make it as six per cent below the average return specified in the contract, and for the year 1937 I now make it eleven per

(Testimony of W. G. Vincent.)

cent below the average return specified in the contract. For the three years there would be an average of six per cent below the average return stated in the contract.

A change in the rate established by lawful authority for the sale of electric energy in San Francisco does not necessarily affect the average return per kilowatt hour, that our Company receives from the sale of energy in San Francisco, because there may be a shift in the relative proportion of energy sold at different rates. In other words, if the rates are reduced, say, five per cent, and during the following year there is less energy sold in proportion at the lower rate, like railway power and heavy industrial power, and a big increase in domestic and commercial use, at the higher rate, then our average revenue per kilowatt hour may be greater than at the higher rate. I might illustrate that in this way: If a shoe merchant were selling two kinds of shoes, one at $10 and one at $5 a pair, and he sold an equal number of [193] pairs of each class, then his average income per pair of shoes would be $7.50. If, however, he reduced the price of the shoes to $9.00 and $4.00, respectively, per pair, and sells three times as many pairs of the $9.00 shoes as he does of the $4.00 shoes he will get an average of more than $7.50 per pair, notwithstanding that he has reduced their prices.

(Testimony of W. G. Vincent.)

If we have a change during the years 1935, 1936 and 1937 amounting to an average of six percent over the three-year period it does not, necessarily, follow that that reduction was the result of reductions in the rates established by legal authority. It might have resulted from shifts in the quantity of electricity taken at different rates. I do not know what the fact is in this regard for the years 1935, 1936 and 1937. I have not traced that through.

There were reductions in rates made in 1936 and 1937. Just how far these reductions in the established rates made in the years 1936 and 1937 were responsible for the decrease in the average return per kilowatt hour to the Company in those years, and how far these reductions were accentuated by shifts in the proportions of electricity taken at different prices, I am not prepared to say.

I do not know whether shifts in the proportions of the amounts of electricity sold at different prices by our Company in San Francisco, in the years mentioned, had anything to do with the failure of our Company to change the basis of accounting to San Francisco under the contract of July 1, 1925 or was a factor taken into consideration in that regard. Somebody else in the Company has charge of the accounting.

(Testimony of W. G. Vincent.)

From August 1, 1925 to the end of December, 1937, estimating the three months of the year still to run, the average revenue of our Company from the sale of electric energy sold in San Francisco was 2.381 cents per kilowatt hour as compared with 2.383 cents per kilowatt hour used as the return base in the contract of July 1, 1925. This is a difference of less than one-tenth of one per cent and I would say that over the twelve-year period that the contract has been in effect, it would amount to approximately $26,000.00. In stating that figure I mentally estimated that the total amounts paid to the City under the contract have been about $26,000,000.00 and one per cent is about $26,000.00.

Q. Would you define to his Honor what is meant by the term "load factor"?

A. A load factor is a term quite frequently used in engineering discussions and investigations and technically it means the relationship of the average load to the maximum load. We speak of a plant running at 50 per cent. or 75 per cent. or 100 per cent. load factor. If it runs at 100 per cent. load factor it means it is running at full load continuously all the time. If it runs at 50 per cent. load factor that means that it averages 50 per cent. of its full load; it may run its full load part of the time [194] and be shut down part of the time, but on the

(Testimony of W. G. Vincent.)

average it runs at 50 per cent. or half of its full load. By 75 per cent. load factor we mean that it is running on the average at 75 per cent. of its full load. It may run certain hours 100 per cent., other hours zero, other hours, 10 per cent., and so on. There is another way of looking at it. A plant may run on an average of 75 per cent. load factor, if in one day of 24 hours, it runs at 100 per cent. of its load for eighteen hours, (three-quarters of the twenty-four), and then shuts down for the day—in such a case it would be operating at 75 per cent. load factor. The load factor in operation of a power plant is important in economics, particularly as to the plant, because the plant represents a substantial investment, and you want to work your investment as much of the time as possible. You put a plant in and operate all the time at full load capacity, if you can. Then your output is lower in cost than if you just operate it half its capacity. In fact, with hydro plants the fixed charges and operating costs are practically fixed without regard to the amount of load you turn out, so if you can operate a plant at 100 per cent. load factor, the cost per unit would be just half of what it would be at 50 per cent load factor. A steam plant is slightly different because you have the fuel element that comes in as part of the operating cost, so that in the engineering depart-

(Testimony of W. G. Vincent.)

ment, the economics of it, we try to arrange to operate our plant to as near capacity as possible. Our system load factor is about sixty-three per cent.

The San Francisco load factor, that is the load factor of the requirements of the consumers of San Francisco, is between forty-five and fifty per cent. In other words, the average demand of the people in San Francisco, during the course of the year is about forty-five per cent of their peak or maximum demand so that if you had a plant in San Francisco it would be operated at a forty-five or forty-seven per cent load factor, if you had to operate it under city conditions only.

Redirect Examination

There was a $300,000.00 rate reduction in 1935, a $1,200,000.00 rate reduction in 1936, and a $1,213,000.00 rate reduction in 1937. The last two of these three reductions were cumulative, that is that there were successive reductions in different schedules. This does not apply to the 1935 schedule. With these various drops in the established rates there were coincident drops in average return to the Company. I do not know just what influence the changes in rates had upon the drop in the average net return to the Company. I have not traced through the shifts in classification. I

(Testimony of W. G. Vincent.)

do not mean to testify that the lowering of the rates would not have any effect on the decline on the average revenue per kilowatt hour. I think that probably part of the declines were due to the rate reductions. I have not traced them through, but the probabilities are that that is the fact. I should say that the major part of the re- [193] duction in the average revenue per kilowatt hour to the Company reflected in the years 1935, 1936 and 1937 was caused by the lowering of the established rates.

Our Company has one control station in Oakland which controls our purchased power, our consigned power and the power developed at our different hydro electric plants, all commingled. The control which our load dispatcher maintains over all of this energy is not based upon the fluctuation and demand of Oakland, San Francisco, Berkeley or San Jose, taking any of them separately. Primarily it is based upon the fluctuation in the entire power demand and not upon the demand of San Francisco or any other city.

Relative to the control of the energy from the Moccasin Creek Plant, that control is based in part upon the fact that we are obligated to take that energy at a seventy-five per cent load factor. When I said that what the load dispatcher controlled "primarily" was our entire

(Testimony of W. G. Vincent.)

power demand, I meant that the load dispatcher tries to meet the load conditions of a system from the power reserves available to him in dispatching the load, but he has a greater limitation on that. Various plants have to have certain loads on them and require a certain power produced, and he has not entire freedom in that respect. He is limited by the limits of contractual obligations whether available in different plants, etc. One of the limitations is the provisions of the contract with San Francisco with respect to the operation of its plant.

Our reason for operating a whole system in a single pool is based upon economy of production. We had a peak this year of nearly a million kilowatts on our peak load. Now, the Moccasin Creek produced about 73,000 or 74,000 kilowatts which is just part of the source of the power that comes into our system at Newark. I don't know into what general area the electric energy goes after it comes into the pool at Newark or what communities, outside of San Francisco, receive it. As I said this morning, the power being brought to San Francisco from the bus bars at Newark, into which the Moccasin Creek energy is supplied—the power coming into San Francisco is, under normal conditions, at all times greater than the amount coming into the bus bars at Newark from the Moccasin Creek plant.

(Testimony of W. G. Vincent.)

The Newark station is the main source of the energy coming into San Francisco. Some power comes from bay cables in Oakland. Our control station is in Oakland. Apart from San Francisco, the Newark station supplies all of the peninsula area down to San Jose.

Counsel for the Government did not understand correctly a part of my testimony. I do not recall testifying that the company sold the power received from the City on or for the account of the City. What we pay the City is based upon the electric energy delivered at Newark and not on the basis of any subsequent delivery of power by the company to consumers. [196]

Recross Examination

The formula upon which the basis of return to San Francisco is computed takes into consideration three factors, transmission loss, the company's average revenue per kilowatt hour, and the 73 plus per cent. which the company retains. The basis of computing the amount due the city is the kilowatts per hour delivered at Newark and multiplying it by 76 per cent., which automatically subtracts 24 per cent. for losses, and then multiplying that figure by 2.383, and then multiplying that figure by 27 per cent., which determines the amount paid the city.

(Testimony of W. G. Vincent.)

When I say that a computation is based upon the delivery at Newark, I mean that the quantity of energy for which we account to the city is measured at Newark and that all of the other factors have to be applied to that amount before we determine how much in dollars and cents is co...ing to the City.

The Government here rested its case in chief.

Defendant's Case

R. B. HANSEN,

a witness for the defendant, testified as follows:

I am a civil engineer with the Public Utilities Commission of the City and County of San Francisco. As such, I am engaged in working involving lands and rights of way belonging to the Hetch Hetchy project and the preparation of maps showing the same. I have worked on the preparation of deeds by which we obtained our rights of way. I am familiar generally with the territory in the country which is comprised within the Hetch Hetchy project. I have worked on that project about ten years, both in the office and in the field. I am familiar with the map marked "Defendant's Exhibit A". It was prepared under my supervision in the office of the Hetch Hetchy Water Supply. It was made up entirely from our office records

(Testimony of R. B. Hansen.)

and is a correct reproduction of the several and various maps which we have in the office of the Public Utilities Commission and which are under my control and jurisdiction. The first legend on the map is entitled "Aqueduct Right of Way in Public Land". This means the right of way that the City got from the Government under the Raker Act. The land shown on the map in green and in purple represents land the City got from the Government under an application under the terms of the Raker Act. The portion colored in green on the map represents the portion of the lands which have been actually used for construction. The portion colored purple on the map represents the lands that will be used for future or proposed construction. In short, the land shown in green and in purple on the map represents all the land the City got from the Government to be used for aqueduct rights of way. The lands shown in red on the map comprise the aqueducts, [197] rights of way over patented land; that is land not obtained from the Government, but obtained by the City from the owners thereof. The map, also, shows the transmission line rights of way. These are colored in the same manner as the aqueduct rights of way, that is the portion shown in green and purple are the transmission line rights of way which the City got from the Government under the

(Testimony of R. B. Hansen.)

terms of the Raker Act and the portion shown in red, are the transmission line rights of way obtained by the City generally from private parties. The same colors have been used to show the railroad rights of way, that is the green represents the rights of way received from the Government upon application, and the red lines show the rights of way purchased from private parties, the situation being that certain areas which formerly were part of the public domain had been acquired by individuals under patents before we wished to acquire our rights of way.

The second item shown by the Map is lands conveyed to the United States of America by the City and County of San Francisco. These lands are shown in yellow on the Map and comprise about 1700 acres. They were purchased by the City from private parties and were given back to the Government. They are not any portion of the land that we originally got from the Government, but are lands we bought from private parties and gave back to the Government. That just about covers the color scheme of the map which, also, shows the boundaries of the Yosemite National Park and Stanislaus National Forest, and, as indicated, shows the lands or rights of way obtained from the Government by the City under all of its applications under the Raker Act. In order

(Testimony of R. B. Hansen.)

to describe the Hetch Hetchy project and how it operates I will start at Hetch Hetchy. At the present time we have a dam located at this point which has an ultimate flow line as shown by the green outline; in other words, this line, here, represents the ultimate flow line of this dam. At Lake Eleanor we also have a dam on Eleanor Creek at the location shown on the map. The flow from Hetch Hetchy dam flows down Tuolumne River to Early Intake. The flow over the Eleanor dam flows down Eleanor Creek and into Cherry River, and also reaches Early Intake. At Early Intake we have the power house, which was mentioned this morning, and at that same point we take the water into our tunnels, and it flows through our tunnels down to a regulating reservoir at Priest, which is shown right here (indicating) on the map; from Priest Reservoir the water flows down a penstock into Moccasin Power plant, and into Moccasin reservoir. From Moccasin reservoir it enters another tunnel and is carried down by a siphon which we have under the reservoir and then into another tunnel and so on to San Francisco. [198]

At this point the Court adjourned until Wednesday, October 20, 1937, at ten o'clock A. M.

(Testimony of R. B. Hansen.)

Wednesday, October 20, 1937, 10 o'clock A. M.

(Direct Examination of R. B. Hansen resumed)

I have examined the Maps marked "Exhibit C" which are attached to the plaintiff's complaint in this action, and purport to show the lands covered by the various applications made by the City and County of San Francisco to the Federal Government and grants and rights [199] under the Raker Act and have compared the lands shown on said maps with the actual lands which the City has received from the Federal Government. The map agrees very well with our office records showing the lands which the City has received from the Government.

I have made a study to compare the lands shown on the map as having been covered by applications of San Francisco with our records showing the lands which we actually received from the Government. Certain of the lands which we applied for we received from private parties to whom they had previously been patented. These are shown in red on the Defendant's "Exhibit A".

As a good example, take the right of way between the Early Intake and Priest, we have a strip of land on which we have both aqueduct and transmission lines. The portion of this land that we got from the Government over unpatented lands is shown in green, and the portion that we got over patented lands is shown

(Testimony of R. B. Hansen.)

in red. The application maps cover the entire strip.

The red strip shown on the map across Section 16, (that is between Early Intake and South Fork) was acquired by the City from private owners; following along you see a repetition of the same situation, as shown by the areas colored in red, all of which represent rights of way acquired from the owners of patented lands. I have made a calculation as to the number of cases where rights of way and easements were obtained from private individuals and not from the Government only in so far as was necessary in the preparation of "Exhibit A". We dug out of our office records each instance in which we dealt with patented lands and platted those things on the map and colored it in red. All of the lands shown on the map in yellow, which I have testified represent lands that we returned to the Federal Government, were acquired from private individuals who had acquired patents to the lands from the Government. The lands so acquired from private owners and returned to the Federal Government amounts to 1698.36 acres.

JOSEPH JAMES PHILLIPS,

a witness for the defendant, being duly sworn, testified as follows:

I am Director of property for the City and County of San Francisco and have occupied that position since January 8, 1932. Prior to that time my position with the City was Chief Right of Way Agent for the Hetch Hetchy project which position I held from August, 1915 to January 8, 1932. I am familiar with the properties of the Hetch Hetchy project.

In connection with the project, I personally handled all of the purchases of property in the Mountain Division which were necessary in the project, and either personally [200] purchased or caused to be purchased under my direction all of the property required by the Project in the State of California.

The acreage given by the United States to the City and County of San Francisco is shown upon "U. S. Exhibit No. 5" which I have adopted as correct, notwithstanding there are some discrepancies between the acreage and the mileage shown on the Maps, included in this Exhibit and our records. These discrepancies are of a minor nature and for that reason I have disregarded them in order to give the value of that land.

Mr. Hennessy: I object to the value. He was not asked for the value. We are not concerned with the value.

(Testimony of Joseph James Phillips.)

The Court: You are asking as to value?

Mr. Holm: Yes. [201]

The Court: Indicate for the record the purpose of your offer, so that we will have a record.

Mr. Holm: The purpose of our offer is this, that we desire to show the equities existing between the United States Government, on the one hand, and the City and County of San Francisco, on the other. We desire to show, briefly, what the project consisted of, what contributions have been made by the United States Government, on the one hand, and what contributions have been made by the City and County of San Francisco, upon the other hand. And we desire to acquaint the court with those very facts so that the Court can then determine in its mind where the equities lie as between the controversies existing as set forth in the pleadings before your Honor now. We wish to show, in brief, that the lands contributed by the United States Government for the construction of this project were in the form of reservoir sites consisting of approximately 2580 acres; that is subject to change in figures by the testimony possibly of this witness. And we desire to show that as of the date of the acquisition of that reservoir site, the value of it, as we have set forth in our Answer. We want to show the total acreage of patented lands acquired by the de-

(Testimony of Joseph James Phillips.)

fendant located in said reservoir sites and necessary for use in connection with said reservoirs was 1545 acres, for which we say the City and County of San Francisco paid a sum in excess of $400,000. We want to show the total mileage of aqueduct rights of way granted by plaintiff to defendant under the terms of said Act, was a certain number of miles, and what the fair market value of that equity was, that it amounted to a very nominal sum, say in round figures $3000. These figures that I am giving your Honor are all subject to change by the witness, who, I hope, will be able to testify. We also wish to show the total mileage of aqueduct right of way purchased by the City and County of San Francisco for the very purpose of helping to develop this hydroelectric power that is under consideration by the Court at the present time, costing the City and County of San Francisco in excess of a million dollars. [202]

We also wish to show that the total value of the roads, trails and temporary rights of way for construction of railroads granted by the Government to the City and County of San Francisco as of the date of the grant did not exceed possibly $3500. We wish to show that the value and the cost in actual money contributed by the City and County of San Francisco for the construction of roads, trails and

(Testimony of Joseph James Phillips.)

camp sites and similar matters which we were called upon to supply to the Government under the terms of the Raker Act was approximately $1,761,000, all of which has inured to the benefit of the United States Government, and they now own those roads and trails and they have them in their possession, to be used by the people of the world, whoever may go there and visit in that Valley. Those are some of the things, and, briefly, about all of the things that we desire to show by this particular witness, and it will be done, if your Honor please, inside of ten minutes.

Mr. Hennessy: We object to that offer upon the ground that this evidence is absolutely immaterial, irrelevant, and incompetent, and not within the issues of this case, and it is not admissible upon any theory; not admissible upon the theory of estoppel, it is not admissible upon the theory of balance of convenience under those cases cited to your Honor, and there is no question of equities involved in this case. It is a simple case as to whether or not there has been a violation of the covenants in the statute and for those reasons we insist upon our objection.

The Court: The Court indicated last evening before adjournment that the general rule applied here, that it did not come within the exception either in the argument or in the show-

(Testimony of Joseph James Phillips.)

ing made. However, I indicated following that I would allow the widest latitude on both sides from the standpoint of the record, so when this record reaches some other court it will be clear what the issues were, and you would have a record. Now, you have also indicated this would take a short period of time and the Court will allow the testimony over the objection of the United States, subject to a motion to strike.

The Witness: I have not finished my answer, but the answer briefly was—I have examined the maps filed by the Government in this case, and while there were some discrepancies I found the figures to be fairly accurate and I accept the Government's figures as to acreage as shown on "Exhibit 5".

The value of the lands granted to the City by the Government was $244,139.45; that embraces all of the acreage shown on "Defendant's Exhibit A", and accords with the legend as set forth on the Exhibit.

I am familiar with the lands shown in yellow on "Defendant's Exhibit A". These are the lands which were acquired by the City and given back to the United States Government.

[203]

Q. Do you know the total acreage and the value?

(Testimony of Joseph James Phillips.)

Mr. Hennessy: I object to that upon the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case.

The Court: The same ruling. I will allow it subject to a motion to strike.

The Witness: This total acreage was 1698.36 acres and its value $74,409.00; that includes all of the acreage acquired by the City and conveyed to the United States Government. The value of the roads and trails constructed by the City is included in my figure of $244,000.00 respecting the value of property granted by the City to the Government.

The Government did not own any of the lands upon which the Moccasin Power Plant is constructed with the possible exception of half an acre up on the hillside that we took as a sort of protective area. The balance was practically all privately owned.

Q. As purchasing agent for the project, and acquiring property for it, did you acquire any water rights from the United States Government?

Mr. Hennessy: I object to the question on the ground it is immaterial, irrelevant, and incompetent. We are not concerned with water rights in this case, your Honor. We are simply concerned with power and the disposition of the power.

The Court: I will allow it subject to the objection and a motion to strike.

(Testimony of Joseph James Phillips.)

The Witness: No.

Witness (continuing): I am familiar with the so-called Ham Hall purchase made by the City and County of San Francisco which involved $1,052,000, and included water rights, lands and development work, buildings and various other items at Cherry and Lake Eleanor.

There are three watersheds involved in the Hetch Hetchy project, one is Hetch Hetchy Valley, the other two are in the watersheds of Lake Eleanor and of Cherry River. Ham Hall purchased the land, buildings and did the development work, surveying and other work in these watersheds of Lake Eleanor and Cherry River.

The water rights of Hetch Hetchy project were acquired both by purchase and appropriation. I have not the value of these rights. The value of the lands obtained from the Government for the project was $244,139.45.

Mr. Holm: Have you the figures of what it cost the City and County of San Francisco to purchase the area that is indicated in red at the Moccasin Power plant on [204] Defendant's Exhibit A?

Mr. Hennessy: I object to that question as immaterial, irrelevant, and incompetent, and not within the issues of this case.

(Testimony of Joseph James Phillips.)

The Court: The objection will be overruled. All of this line of testimony is going in subject to a motion to strike.

The Witness: A. I have not the itemized figures here of the various properties. What I have is my valuation of real property owned by the City and County of San Francisco which under the charter it is my duty to prepare every year, and which shows all properties owned by the City. In this book is everything in connection with the Hetch Hetchy project.

Q. Would you kindly relate what the properties are that are used in connection with the Hetch Hetchy project, and their value?

Mr. Hennessy: I object to that question upon the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case.

The Court: The objection is overruled.

Mr. Hennessy: Note an exception.

The Witness: A. I have before me a report showing—do you want the property as well as the price?

Q. Yes, I certainly do.

A. Tuolumne County there is a reservoir land, rights of way, reservoir land, aqueduct, power plant, regulating reservoir, rights of way, electric transmission lines and rights of way, Hetch Hetchy railroad land and rights of way. In further toward the city I have railroad land, aqueduct and electric transmission line,

(Testimony of Joseph James Phillips.)

with a total of $2,372,514. Those are the actual figures taken from the deeds.

Q. That likewise is the amount of money that the City and County of San Francisco paid for aqueduct, tunnels, rights of way, parcels of land that were required to be acquired in fee, and, in short, the entire value of the real property involved or the easements in the Hetch Hetchy project?

A. Yes.

Cross Examination

The patented lands acquired by the City and County of San Francisco were acquired both before and after July 1, 1925, but, practically, all of them prior to 1925. The value which I have given to these patented lands is their cost price. In stating the value of the land given by the Government to the City [205] I had in mind the date of acquisition and the date of the signing of the contract of July 1, 1925, as there was practically no difference in the value during that period, either date would fit. The lands and easements given by the Government to the City and County of San Francisco under the Raker Act had been acquired by the City prior to July 1, 1925. It was necessary that San Francisco acquire these lands and easements in order to complete the Hetch Hetchy project.

R. B. HANSEN

recalled as a witness for the defendant, further testified as follows:

I have prepared from our office records a memorandum showing the cost to the City and County of San Francisco in carrying out its obligation under the Raker Act with respect to the construction of roads and trails to be given to the Government, the cost of the lands which were to be conveyed to the Government and the amounts that were annually to be paid to the Government under the terms of the Raker Act by way of rentals and expense by the Government. (Admitted over plaintiff's objection and subject to motion to strike.)

As shown by our office records the actual cost to the City of the trails mentioned in Section 9(p) of the Raker Act on the north side of the Hetch Hetchy Valley, reservoir site and extending from said trail to the Tiltill Valley and to Lake Vernon, and the road or trail to Lake Elcanor and Cherry Valley and to McGill Meadow was $82,670.04. (Admitted over plaintiff's objection and subject to motion to strike.)

Q. In addition to that, in lieu of the building of the trails on the north side of the valley, and constructing the road from Hetch Hetchy to all those valleys were certain amounts paid to the United States Government and accepted by the Secretary of the Interior in or about the year 1930?

(Testimony of R. B. Hansen.)

A. They were.

Mr. Hennessy: I object to the question as immaterial, irrelevant, and incompetent and subsequent to the entering into of this contract between the Pacific Gas & Electric Company and the City and County of San Francisco.

Mr. Searls: That is all the more reason it should be introduced, because if the Secretary of the Interior, after the city entered into this contract, continued to accept on behalf of the Government the benefits under the grant it ought to bear more upon a court of equity.

Mr. Hennessy: We are not asking for a forfeiture of the grant. We are simply asking for a compliance with the Raker Act.

Mr. Searls: But you are asking for an injunction which would be tantamount to a forfeiture as it prevents [206] the city from distributing its power.

Mr. Hennessy: The city could distribute power to municipalities, municipal water districts and irrigation districts under this Act.

Mr. Searls: We will show pretty soon the impossibility of doing that.

The Court: The objection will be overruled. I will allow it.

The Witness: A. There were five payments made by the City and County of San Francisco to the United States Government, a payment of $250,000 in each of the five years, 1932 to 1936, inclusive. This gives a total of $1,250,000.

(Testimony of R. B. Hansen.)

Counsel for the defendant offered in evidence a letter dated December 8, 1930, from Ray Lyman Wilbur, Secretary of the Interior to John J. O'Toole, City Attorney of San Francisco, with respect to the payments to the Government concerning which the witness had testified. Said letter was received in evidence, and marked

"DEFENDANT'S EXHIBIT B".

It reads as follows:

"The Secretary of the Interior,

Washington Dec. 8, 1930

John J. O'Toole, Esq.,
City Attorney,
San Francisco, California.

My dear Mr. O'Toole:

I have received with a letter of transmittal dated December 8, 1930, signed by Senators Hiram W. Johnson and Samuel M. Shortridge and Representatives Richard J. Welch and Harry L. Englebright, argument presented by the Committee representing the City and County of San Francisco at conference in this Department on December 4, 1930, in regard to the existing arrangements for the distribution of power from the Hetch Hetchy project in Yosemite National Park, together with tentative agreement reached in conferences of said Committee with the Director of the National Park Service on December 5 and

(Testimony of R. B. Hansen.)

6, 1930, relative to the City's obligations as to the construction of roads and trails in the park under the Raker Act, said agreement being subject to final approval by the Board of Supervisors of San Francisco.

I have carefully considered the proposal of the City relative to a fulfillment of its road and trail construction obligations under the Raker Act and have to advise that the program submitted, if approved by the [207] Board of Supervisors, will fully satisfy the demands of this Department as to such construction as provided for under said Act.

I note that your communication advises the Department of the City's three-year program for compliance with the provisions of the Raker Act respecting power distribution, which will be followed with interest. Kindly keep me advised of the completion of the successive steps outlined.

Sincerely yours,
(s) RAY LYMAN WILBUR,
Secretary."

[Witness continuing]: The program to which I have testified cost $1,250,000.00, was the program which was subsequently approved by the Board of Supervisors and followed out. In addition to this expenditure the City paid the

(Testimony of R. B. Hansen.)

entire cost of grading and constructing the present highway, nineteen miles, leading from Mather into the Hetch Hetchy Valley. Its cost was $353,500.91. That road has been conveyed to the United States Government and is being used by the public. (Admitted over plaintiff's objection and subject to motion to strike.)

The City also constructed a wagon road from Hetch Hetchy reservoir to Lake Eleanor at a cost of about $75,000.00. That road is available for public use under safety restrictions. In addition, the City reimbursed the Tuolumne Water Supply Company to the extent of $85,000.00, for sums expended by that Company between 1902 and 1911 in constructing roads and trails in the Stanislaus National Forest which the City later made available to the Government and the public. The total expenditures made by the City in the construction of roads and trails in the National Park or for which money was furnished by the City, either to the Government or to its predecessor, in interest, when the trails were later turned over to the Government, was $1,846,170.95. In compliance with Section 9(t) of the Raker Act, the City returned to the Government 1698.36 acres which it had previously bought from private persons and which were not necessary for use under the provisions of the Raker Act. These lands have been appraised at $100.00 an acre which

(Testimony of R. B. Hansen.)

would give their total appraised value $169,836.00. (Admitted over plaintiff's objection and subject to motion to strike.)

The City has regularly paid to the Government the annual payments required to be made to it by Section 7 of the Raker Act. All of these sums have been remitted to the Secretary of the Interior and retained. The total amount so paid, including payments for the year 1937, was $330,000.00. (Admitted over plaintiff's objection and subject to motion to strike.)

Q. I ask you whether you have capitalized what the payments of this semi-annually to the Government will mean to the City and County of San Francisco?

Counsel for the plaintiff objected to the question upon the ground that it was irrelevant, incompetent and immaterial, and had no bearing [208] upon the issues of the case.

The Court sustained the objection.

Counsel for the defendant duly excepted to said ruling. Said ruling and exception are herein designated as Ruling and Exception No. 8.

I have apportioned the proper overhead expense of engineering, and administration with respect to the item of maintenance and trails and roads and have estimated it at ten per cent of the total. If the amount thereof be

(Testimony of R. B. Hansen.)

added to the cost of the roads and trails as previously given, the grand total would be $2,702,607.00. (Admitted over plaintiff's objection and subject to motion to strike.)

Mr. Searls: I desire to offer in evidence a letter from Secretary of the Interior Hubert Work, dated May 18, 1928, addressed to the City and County of San Francisco, care of the City Attorney, and dealing with the requirements of the Government with respect to road construction and the program which was to be followed by the city.

Mr. Hennessy: We object to it upon the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case. The Court is not concerned with the matter of compliance with other provisions of the Raker Act in question. There is the further objection that the Government is not bound by any statement made by Secretary Work or any other administrative officer of the Government in connection with this matter.

The Court: What is the purpose of the offer?

Mr. Searls: The purpose of the offer is to show that the Secretary of the Interior commencing after the date of this contract repeatedly called upon the city to perform its obligation under the grant and, as this letter will show, suggested the use of the power revenue

(Testimony of R. B. Hansen.)

which was derived under this particular contract with which to finance part of this obligation. We think it is a very important consideration for the Court, on argument, and we would like to have these facts in the record for the purpose of so doing.

The Court: I will let you make your record. I will allow it.

Said letter was thereupon received in evidence and marked

"DEFENDANT'S EXHIBIT C".

It reads as follows:

"The Secretary of the Interior
Washington

May 18, 1928

The City and County of San Francisco,
Care of the City Attorney,
San Francisco, California. [209]

Gentlemen:

In response to a formal request for compliance with certain obligations imposed by the act of December 19, 1913 (38 Stat. 242), commonly known as the Raker Act, made by letter of July 7, 1927, the City Attorney for the City of San Francisco, on October 13, 1927, addressed to this Department a statement of the contentions of the City with respect to those obligations.

(Testimony of R. B. Hansen.)

Full and careful consideration of these contentions was had by the Solicitor for this Department, whose views are set forth in an opinion, a copy of which is inclosed. These views have been approved by the Department.

The conclusion has been reached that the roads and trails required to be built and maintained by the City are such as would have been required had performance of these conditions been tendered by the City in 1913. This raises the question whether the requiremnts stated in the letter of July 7, 1927, were of roads and trails in excess of those standards.

As stated in the Solicitor's opinion the test is not only as to the kind of roads and trails which were necessary to make Yosemite National Park easily accessible to the public visiting said park in 1913, but includes the kind and quality of roads which would have been required to meet what would then have been regarded as a reasonable future need of the public in the park.

The contention of the City that the main roads leading into the Yosemite National Park and the main roads with which the roads required to be built would connect, are to determine the standard of construction required, can not be accepted as correct.

Data available indicate that in 1913, the United States owned only 46 miles of road in

(Testimony of R. B. Hansen.)

Yosemite National Park, all of which were in the Yosemite Valley or in the Mariposa Big Tree Grove. There were also within the park approximately 106 miles of wagon road typical mountain roads which in many instances had so fallen into disrepair as to be impassable. The Tioga Road, referred to in the letter of the City Attorney, was in that condition and the Big Oak Flat Road, also mentioned, was used to some extent by park visitors, but was not in a satisfactory condition. There was also a road from Groveland via Smith Station or Hamilton to Hog Ranch, which was a typical mountain road. One of the requirements of the Raker act was that a road be built by the City over this latter route, which requirement necessarily meant that roads of that standard were not regarded as adequate.

During September, October and November, 1912, the road on the floor of the Yosemite Valley from Pohono Bridge to Yosemite Village was graded and macadamized near Camp Ahwahnee. This road was macadamized to a width of 22 feet and from May to July, 1913, further work was done in that [210] vicinity, the road being macadamized to a width of 16 feet. In May, 1913, work was started toward widening the El Portal Road between El Portal and Yosemite Valley from 10 feet to 25 feet, with a driveway 18 feet in width.

(Testimony of R. B. Hansen.)

Certain of the foregoing work was of an experimental nature and consisted of covering a water-bound macadam road with a two-inch bituminous coat. Two grades of bituminous material were tried, i. e., a road oil and also pure asphaltum, the top-wearing coat being 12 feet in width.

The fact that most of the roads within the Yosemite National Park were privately owned prevented much progress until said roads could be acquired by the United States, and limited appropriations for road building also deterred rapid development of roads, the need for which was recognized prior to 1913.

All the roads in and about the park in 1913 had been built long prior to that time, and solely for horse-drawn vehicular travel. It was recognized that those roads were unsafe for automobile travel, and it was not until August, 1913, that automobiles were permitted to enter Yosemite National Park. This was permitted as the result of repeated requests by automobile associations. The State of California built its first automobile road in 1912, and by 1913 definite progress on such roads was being made.

All these facts were known when the Raker act was passed and in leaving to the Secretary of the Interior the right to specify the kind of roads to be built, the Congress and the City

(Testimony of R. B. Hansen.)

plainly intended that he should specify roads of a kind which would care for not only present but future travel within the park. It is not believed that the City intends to assert that, by the provisions in the Raker act for roads to be built by it to important points within the park, said roads to be perpetually maintained, travel by a then established and rapidly growing mode was to be excluded from those areas. The purpose of the City, as stated in its brief in support of the Raker act, was to make the park readily accessible to all the people, and the City of course, now intends to do no less than that.

The notice of July 7, 1927, contemplated roads made of crushed rock with a water-bound macadam surface of 18 feet travelable width. The maximum grade was to be 8 per cent. In the case of the road formerly the bed of the railroad built by the City, it was intended that this road be surfaced with asphalt penetration macadam. Should Cherry Valley be opened in the future by a road, then a road from Lake Eleanor to Cherry Valley of the above standards will be required.

The foregoing standards are not in excess of those which in 1912 and 1913 were being considered by the United States for Yosemite National Park. [211]

These requirements are not met by the two roads built by the City for its own use, and

(Testimony of R. B. Hansen.)

its contention that said roads have heretofore been approved as satisfactory in that respect, is not supported by the records.

No issue is raised as to trails required to be built.

The Department, in view of the foregoing repeats its request of July 7, 1927, that roads and trails of the kind specified be constructed without delay.

Meeting the request of the City for an extended program for road building, it is concluded that the order in which this work should be carried out is as follows:

1. Construct a trail along the north side of the Hetch Hetchy reservoir and to Tiltill Valley and Lake Vernon. This work will probably require from 9 to 12 months for completion.

2. Construct the Harden Lake road which reasonably might require one year's time.

3. Construct the Hetch Hetchy-Lake Eleanor road. This work may possibly require 18 months.

4. Reconstruct and surface the road from Hog Ranch to the Hetch Hetchy dam, which will probably require 6 months' time.

The foregoing program covers a period of four years, which is the time estimated by the City as necessary to complete the project so as to place the stored waters in actual use for

(Testimony of R. B. Hansen.)

domestic purposes. The City, however, is annually deriving from power development, revenues estimated at an excess of two million dollars, which revenue for any one year will more than pay the cost of the roads required by the Department.

In view of the foregoing it is concluded that the request for roads and trails heretofore made is a reasonable and proper one which should be met within the time specified.

In the matter of conveying lands to the United States, the contention of the City that it is not required to convey lands acquired by it after the passage of the Raker act is recognized as correct.

The right of the City to retain for sanitation control or any other purpose, lands not actually required for the works of its project, whether adjoining the reservoirs or elsewhere, can not be recognized since the Raker act and the circumstances under which it was adopted clearly show that all lands then owned and not so required were to be conveyed to the United States as partial consideration for the grant made to the City. [212]

If the City now contemplates the increasing of the heights of the dams at Hetch Hetchy or Lake Eleanor, it should so state, giving information as to the probable time when such work will be done and the need for the same. If such

(Testimony of R. B. Hansen.)

enlargement is approved, the flow lines of the enlarged reservoirs can be readily ascertained and the quantum of upland to be conveyed to the United States can then be determined.

With the exceptions above stated as to after-acquired lands, the request for conveyances of lands, made on July 7, 1927, is hereby repeated.

The City is requested to arrange at once for compliance with the foregoing requests, which are in conformance with an opinion of the Attorney General of the United States, whose duty to enforce the provisions of the Raker Act is created by said statute, rendered under date of May 16, 1928, copy of which is herewith inclosed.

Very truly yours,
(Sgd.) HUBERT WORK,
Secretary."

By stipulation, counsel for the defendant were permitted to withdraw the original letter, which is part of the office records of the City Attorney's office, and to substitute a copy of said letter therefor.

JOHN J. DAILEY,

a witness for the defendant, being first duly sworn, testified as follows:

I am a Deputy Attorney General of the State of California. From 1917 to 1928, or 1929, somewhere along there, I was Assistant City Attorney of the City and County of San Francisco. In my capacity as Assistant City Attorney during the year 1925, I had to do with the preparation of the contract between the City and County of San Francisco and Pacific Gas and Electric Company relative to the distribution of the power generated at the Moccasin Creek Plant of the Hetch Hetchy project. I am familiar with said contract. I practically drew it with the assistance of Mr. Searls.

I recognize "U. S. Exhibit No. 6" now shown me, as the contract which Mr. Searls and I prepared. At or about the time that the contract was prepared I had conferences or conversations with the Secretary of the Interior or an Assistant Secretary regarding the provisions of the contract. These conversations were held at Wash- [213] ington, D. C., in the Department of the Interior. The first conferences were had some time in June, 1925, and extended over a period of two or three weeks. I had gone from San Francisco to Washington for the purpose of discussing the contract. As stated, the first conversations were in June, 1925, and extended up to the earlier days of July, I think the first

(Testimony of John J. Dailey.)

or second of July. I, possibly, had some conversation with him then. I did not leave Washington until after the 4th of July.

My conversations were with Mr. Edwards, who was the Assistant Secretary of the Interior. I had a number of conferences with him.

Accompanying me on my trip to Washington and representing the City of San Francisco with me were Mr. Searls, who is present here in Court, and Mr. Nelson Eckhart, one of the engineers of the City.

At the conversation which we had with Mr. Edwards during the month of June, 1925, there were present with Mr. Edwards, Mr. Eckhart, Mr. Searls and myself. The three of us had several conversations with Mr. Edwards before we had further conversations with other people in the department. These conversations were held in the office of the Department of the Interior building. Mr. Edwards was the Assistant Secretary of the Interior. At one time he was Solicitor of the Department. I am not positive whether at the time of our conversation with him, Mr. Edwards was solicitor of the Department or the Assistant Secretary. I am under the impression that he was at that time the Assistant Secretary and had formerly been Solicitor. I may be mistaken about that, but he was acting on behalf of the Secretary in this matter because it had been referred to him. At the time he was either the Assistant Secretary

(Testimony of John J. Dailey.)

of the Department or Solicitor for the Department.

Q. Now, will you state the substance of the conversation?

The plaintiff objected to the question upon the grounds that it was hearsay, not with a party to the cause or with anybody authorized to bind any party to the cause, that the proper foundation had not been laid in that the identification of the party with whom the conversation was had, had not yet been established, nor the time of the conversation established with any particular definiteness. The Court sustained the objection to the question, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are herein designated as Ruling and Exception No. 9.

(The witness continuing): [214]

At a subsequent time, I had a conference with Dr. Hubert Work, Secretary of the Interior, relative to the contract. That conversation took place in Dr. Work's office in the Department of Interior Building. There were present at it with me, Mayor Rolph of San Francisco and Ralph McLaren, then Chairman of the Board of Supervisors of the City and County of San Francisco. That conversation occurred late in July or early in August of 1925. It was on a second trip I had made to Washington on the same matter. There were present at this later conference, Dr.

(Testimony of John J. Dailey.)

Work, Secretary of the Interior, Mr. Edwards, Mayor Rolph, Supervisor McLaren and myself. There may have been some other Secretary or clerk there, but I am not sure. The subject of the conversation was the contract of July 1, 1925, which we had placed before the Department of the Interior.

Q. State the substance of the conversation between those present at that conference.

To this question counsel for the plaintiff objected upon the ground, first, that it was hearsay, and, second, that it is not binding upon and could not have bound the United States. [215]

After the argument the pending question was read to the witness as follows:

(Q. State the substance of the conversation between those present at that conference? (Referring to the conference at which are present Mayor Rolph of San Francisco, Ralph McLeran, Chairman of the Board of Supervisors of San Francisco, and the witness, representing the City, and Dr. Hubert Work, Secretary of the Interior of the United States).)

Thereupon counsel for the Government restated his objection to said question as follows:

We object to the question upon the ground that it is hearsay, there being no evidence it was the statement of any party to this contro-

(Testimony of John J. Dailey.)

versy and it does not appear that the party who made the statement was in any way empowered to bind the Government and on the further ground that what is sought to be elicited is irrelevant, incompetent and immaterial, and has no bearing or issue upon the case.

The Court overruled the objection and stated that it would allow the testimony to go in subject to a motion to strike it out.

The Witness: In this conversation in the office of Dr. Work, the Secretary of the Interior, which occurred some time in August, 1925, possibly the same day that he wrote a letter which he handed to Mayor Rolph, or myself, on behalf of the City, and somewhere after the first of August, 1925, (which was subsequent to the delivery of the contract of July 1, 1925), the Secretary of the Interior at the very close of our conversation with him, relating to this contract, told us that it was not his duty to approve contracts submitted to him; that he would only be called upon to perform the duty if he believed that the City and County was violating the terms of the Raker Act; that he was not prepared to say that the City was violating it; that, as far as he was concerned, he would let the matter run on to be determined at some later date, after he saw what the operations of the contract would re-

(Testimony of John J. Dailey.)

sult in; that was the substance of the conversation. (It was stipulated by the counsel that this conversation was subsequent to the execution of the contract of July 1, 1925, and subsequent to the commencement of operations by the parties under that contract.) [216]

Thereupon counsel for the plaintiff moved to strike out the answer of the witness relative to the conversation as not being within the terms of the purpose for which it was offered, and not within the offer. In that connection counsel for the plaintiff stated that the conversation had been offered as a contemporaneous construction of the contract, and that forfeiture had nothing to do with that statement. In response to said motion, the Court stated as follows:

"I will allow it subject to the motion."

Thereupon the following occurred:

Mr. O'Toole: Q. Mr. Dailey, I believe you stated this morning that you were one of those who aided in the preparation of the contract between the City and County of San Francisco and the Pacific Gas & Electric Company relative to the disposition of Hetch Hetchy power.

A. Yes.

Q. At the time you were engaged and before you started preparation of that contract did you have any ruling or opinion from the Secretary of the Interior or from any of his solici-

(Testimony of John J. Dailey.)

tors, as to whether or not an agency contract might fulfill the obligations of the Raker Act?

A. We had.

Mr. Licking: If your Honor please, I do not see the materiality or relevancy of this. The question before this Court, as I understand it, is whether this is an agency contract or whether it is not an agency contract. I think that is the Government's position clearly enough. Any correspondence which they may have as to whether an agency contract would do or would not do hasn't much to do with this case. If it is an agency contract and the P. G. & E. as the agent is serving the City and County of San Francisco instead of buying it might be that the Raker Act is not being violated, so it would seem to me that the previous conversation relative to an agency contract is not material to any issue in this case. I object to them on the first ground that they are clearly hearsay, not binding on the Government in this case, and, second, that they are not relevant to any issue in the case.

The Court: The objection will be sustained.

Thereupon, the following occurred:

Mr. Searls: I would like to ask counsel for the Government if he will stipulate that if this contract was a contract of agency it would not violate the terms of the Raker Act.

(Testimony of John J. Dailey.)

Mr. Licking: No, I could not stipulate to that, [217] because of the facts in the situation that we are concerned with in addition to the contract.

Thereafter, as the result of further discussion between counsel, the objection to said opinion (being an opinion dated June 8, 1923, by John H. Edwards of the U. S. Department of the Interior relative to the disposal of power by the City and County of San Francisco) was withdrawn, and said opinion was admitted in evidence, marked

"DEFENDANT'S EXHIBIT D".

It reads as follows:

"Department of the Interior
Office of the Solicitor
Washington

M. 10228 June 8, 1923.

The Honorable
The Secretary of the Interior.

Dear Mr. Secretary:

At the request of the National Park Service there has been referred to me for opinion the question whether the City and County of San Francisco may sell to a private corporation for the purpose of resale and distribution to consumers the electric energy developed under its grant contained in the act of Congress approved December 19, 1913 (38 Sta., 242).

(Testimony of John J. Dailey.)

Section 1 of that act granted to the said municipal corporation rights of way over public lands in certain specified counties and in the Yosemite National Park and the Stanislaus National Forest, or portions thereof, lying within the said counties, for the purpose of constructing, operating, and maintaining aqueducts, canals, ditches, pipes, and other conduits for conveying water for domestic purposes and uses; also for the purpose of constructing, operating and maintaining power and electric plants, poles, and lines for generation and sale and distribution of electric energy; also for telegraph and telephone lines, roads, railroads, and other means of locomotion, transportation, and communication, such as may be necessary or proper in the construction, maintenance, and operation of the works constructed by the grantee; also the right to use such lands in the Hetch Hetchy Valley and other specified places as the Secretary of the Interior may determine to be necessary for reservoirs, diverting and storage dams, power houses, and other construction necessary in connection with said project.

Section 6 of the said act provides:

'That the grantee is prohibited from ever [218] selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric

(Testimony of John J. Dailey.)

energy sold or given to it or him by the said grantee; Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.'

Section 9 of the act contains the following several provisions:

'That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:

* * * * * * *

That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations and decisions respecting the rights, benefits, or obligations specified in this Act, which investigations or decisions involve expense to said Department of the Interior, then such expense shall be borne by said grantee.

* * * * * * *

That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is

(Testimony of John J. Dailey.)

made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.'

Section 11 reads as follows:

'That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State.'

[219]

It is shown by certain correspondence submitted to me that the grantee has been since 1918 selling its surplus hydroelectric energy to the Sierra and San Francisco Power Company and to the Pacific Gas and Electric Company. It is stated that in the first instance this was done by order of the Federal power administrator during the war. The total sum received from the sale of this power is something more than $200,000. It also appears that the city engineer

(Testimony of John J. Dailey.)

has recommended to the board of supervisors more extensive sale of power to private corporations for distribution to save the necessity of purchase or construction of a distribution system by the grantee for the time being.

The sales made under the war emergency order may be eliminated from consideration. The inquiry will be directed to the more important point contended for by the grantee as represented by the city attorney, namely, that the grantee is strictly within its rights under the terms of the grant in selling such power in the manner stated for the purpose of resale; that if any restriction of this nature is contained in Section 6 of the act, it applies to the purchaser and not to the grantee; that in any event the act does not provide any forfeiture for such violation or any means by which the restriction can be enforced.

I have been unable to find in the language of the act support for this view of the law. I understand its provisions to be exactly and plainly opposed to such construction. The prohibition against such sale for the purpose of resale is contained in section 6 of the act above given. The act clearly contemplates public development and ownership, sale and distribution to consumers of the water and hydroelectric energy, and not merely the development of water and power for sale to private concerns

(Testimony of John J. Dailey.)

for resale and distribution. The legislative history of this law amply supports this interpretation of the language employed in the act.

The House Committee of Public Lands, in its report on the bill (Report No. 41, 63d Congress, first section), said in respect to section 6 of the act:

> 'Section 6 provides that the grantee is prohibited from selling or letting to any corporation or individual, except a municipality, a water district, or an irrigation district, the right to sell or sublet the water or electric energy sold or given to it by the grantee; it is provided also that the rights under the grant shall not be subject to sale, assignment, or transfer to any private persons, corporation, or association. (This provision acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco.)' [220]

That report contained a brief by the grantee urging enactment of the bill wherein the condition here in question was characterized as follows: "The City is prohibited from ever selling to private corporations or individuals the right to sell water, thus protecting this grant from ever falling into the hands of speculators."

This section was the subject of extended discussion when the bill was pending in the House

(Testimony of John J. Dailey.)

of Representatives, wherein Mr. Raker, Mr. Ferris, and other members of the Committee on Public Lands took part. It was stated that San Francisco did not own its lighting system, and Mr. Raker said that it was the purpose of the bill to have the city supply electric power and water to its own people. He was asked pointedly whether the plan was to furnish this direct to the people or to supply the corporation which would in turn supply the people. He answered in part as follows:

"Under this bill it is to supply its own inhabitants first. It is to supply the public utilities, the courthouse, the schoolhouses, the street lights, and such things as that for its own citizens. Next, it is to supply those around the bay—some 10 cities that may come under the State law and become beneficiaries of this system and pay their proportion.

The cities around San Francisco Bay join in asking that San Francisco be given the Hetch Hetchy grant. These cities propose—and the State law permits—to organize a metropolitan water district, and the Hetch Hetchy system, together with the local water, will insure an adequate supply for the future." (Page 4624, 63d Congress, first session.

In the course of discussion, it was suggested that some of the minor municipalities might

(Testimony of John J. Dailey.)

abuse their privileges by taking more power or water than needed for their use and selling same to private corporations for resale, and it was suggested that this resale should be guarded against. Speaking to this point, Mr. Thomson, a member of the Committee, said at page 4417:

'Is it not correct that this section, as it reads now, provides substantially that the grantee under this act can not sell to any individuals or corporation other than a municipality the right to take any of this water and this power and resell it to somebody else? That is provided here now.

* * * * * * * *

Let me suggest that if this language is read carefully I think it will be seen that it covers the gentleman's contention. These municipalities are prohibited from ever sell-

[221] ing or letting to any corporation or individual except a municipality the right to take any of this water and this power and resell it.'

He further said that the municipalities could sell only to consumers.

There is found much discussion along the same line at various places in the record. At page 4509 Mr. Ferris, chairman of the committee in charge of the legislation, said that

(Testimony of John J. Dailey.)

the City is to be given the right to sell to its own people who are consumers but that "they can sell for use only with a positive restriction against sale for any resale purposes of any sort." At page 4512 of said record Mr. Thomson, a member of the committee, gave voice to the following clean cut and emphatic expression:

'Mr. Chairman, there seems to be some misgivings in the minds of some of the gentlemen here about the amount of compensation, and that seems to have arisen, in some measure, at least, because of doubt on the part of some as to the power possibilities in this bill. When this bill was being considered by the committee, I offered an amendment to section 6, line 16, as it appears in the bill, by adding the words 'or electric energy.' With those words in that section, the bill amounts to this, that San Francisco can take this water, and San Francisco may develop such power as it may develop from the drop of that water from the Hetch Hetchy to the level of the city reservoirs, and San Francisco may sell this water or electric energy to whom? To any other municipality that may come in under the provisions of this bill, or to any private individual in the city for consumption, or to any corporation in the city

(Testimony of John J. Dailey.)

for consumption, and only for consumption, and under this section it is absolutely impossible for San Francisco to sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of reselling it.'

I am of the opinion that the language of section 6 comports with the purpose of the law as declared by the several members of the committee in charge of the bill. The debates in the Senate were devoted mainly to other provisions of the bill and this particular feature was given only incidental attention. It is observed, however, that Mr. Poindexter, an opponent of the measure, used the following language, page 301, second session, 63d Congress:

'There is a specious provision in the bill that the city of San Francisco shall not grant to any private person the right to sublet or to sell the power or the water which it may acquire the right to develop or to use under this bill; but that is left entirely to the good faith of the city. [222]

There is no forfeiture clause; there is no practical way in which the Federal Government could ever enforce that provision.'

At another place in the debate reference was made to the fact that the first provision in sec-

(Testimony of John J. Dailey.)

tion 6 is similar to that contained in the grant to the city of Los Angeles by the act of June 30, 1906 (34 Stat., 801). In reply to that suggestion, Senator Works stated that in that case the provision was not objectionable to Los Angeles; that the provision amounted to nothing, as the State law imposed the same restriction, and this was merely a statement of the law of California.

But the city attorney takes a different view of the law of the State of California, as he says the laws of that State permit the city to sell power to any person it pleases, and that if section 6 be read in connection with section 11 of the act there would be no restriction on the right of the city to sell its power.

Section 11 of the act above quoted was drawn from section 8 of the Federal reclamation act of June 17, 1902 (32 Stat., 388), and contains substantially the same provisions, which fact was mentioned repeatedly in the debates of the Hetch Hetchy bill. Clearly it was designed to disavow any intention to interfere with water rights acquired under the State laws.

There was shown in the debates on this bill much difference of opinion as to the power of Congress to impose the various restrictions contained in the act, and the House Committee in its elaborate report cited numerous court decisions and legislative precedents in support

(Testimony of John J. Dailey.)

of the provisions of the bill. I deem it inappropriate to enter that field of discussion, my function being to advise merely as to what the law provides and the manner of its enforcement. I have indicated above that in my opinion the law prohibits the sale of electric energy by the grantee for the purpose of resale. The method of enforcing the act is plainly stated in the proviso to section 9. I may add, however, that I would not recommend resort to that extremity at this time, but would make known to the grantee the views of this Department in the matter with a suggestion that arrangement be made for the use or distribution of the surplus electric energy by a method which would not conflict with the law. It seems reasonable to suppose that the grantee may find obstacles in its way which would make it impracticable to acquire or construct a system for the transmission of its limited supply of electric power, and to avoid waste of this surplus energy it is quite desirable that the existing means of transmission be availed of until such time as the supply becomes sufficient to justify the taking over of the present system or the construction of a new one. But instead of selling this power for resale and distribution, as has been done and as further proposed, it occurs to me that it would be feasible for the

(Testimony of John J. Dailey.)

parties to agree upon terms by which the grantee would have its power trans- [223] mitted over the lines of the concern owning or controlling the existing distribution system. This method would avoid conflict with the provisions of the law and apparently would accommodate the grantee to the existing conditions of the project. Should the grantee decline to consider this or any other method for use of the electric power in conformity with the grant, as here interpreted, then I would suggest submission of the matter to the Attorney General as provided by section 9 of the act.

Respectfully

(Signed) JOHN H. EDWARDS,

Solicitor.

June 8, 1923.

Approved:

(Signed) E. C. FINNEY

First Assistant Secretary."

Thereupon, the following occurred:

Mr. O'Toole: Q. Mr. Dailey, in the preparation of the contract between the City and County of San Francisco and the Pacific Gas & Electric Company as to the distribution of the Hetch Hetchy power, did you rely upon

(Testimony of John J. Dailey.)

the rulings of the Solicitor of the Department of the Interior relative to the validity of an agency contract?

Mr. Licking: To which I object on the ground it is immaterial what Mr. Dailey relied on or what anyone relied on. That has not any bearing on the question now before the Court, as to what this contract actually is.

The Court: The objection will be sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 10.

Cross-Examination.

The conversation with Secretary Work to which I referred in my direct examination occurred shortly before he handed us a letter, because when we went to his office the letter had already been written to us and he gave it to us at that conversation. The letter, dated August 9, 1925, from Hubert Work, Secretary of the Interior, to Hon. James Rolph, Jr., Mayor of San Francisco, a certified copy of which you now show me is the letter which was handed to Mayor Rolph at that conversation.

[224]

Counsel for the plaintiff thereupon offered said certified copy of said letter in evidence. It was received in evidence and marked

(Testimony of John J. Dailey.)

"U. S. EXHIBIT No. 15";

it reads as follows:

"The Secretary of the Interior
Washington,

August 19, 1925.

Hon. James Rolph, Jr.,
Mayor of San Francisco,
New Willard Hotel,
Washington, D. C.

My dear Mr. Mayor:

The act approved December 19, 1913 (38 Stat. 242), does not require the Secretary of the Interior to approve or disapprove contracts such as the contract entered into between the City and County of San Francisco and the Pacific Gas & Electric Company dated July 1, 1925.

It is the duty of the City and County of San Francisco at all times to comply with and observe on its part all the conditions specified in this act; and it is the duty of the Secretary of the Interior, in the event that the conditions specified in the act are not reasonably complied with and carried out, to report the facts, after notifying the City and County of San Francisco in writing, to the Attorney General for such suits or proceedings in the proper courts as the law and the facts in his opinion warrant. The Secretary should not act at this time, but must await such development of facts as

(Testimony of John J. Dailey.)

will enable the Secretary to determine with a certainty whether or not this act is being reasonably carried out by the City and County of San Francisco.

The violation of the law, if any, is a fact evidenced by acts, and the Secretary must necessarily await a reasonable time until performance shall have indicated whether or not the acts of the parties constitute such a violation of the law as will make action on his part proper.

Very respectfully,
(Signed) HUBERT WORK,
Secretary."

Redirect Examination.

Counsel for the defendant offered a letter dated July 20, 1925, signed by C. Edward Wright, Acting Solicitor of the Department of the Interior, and addressed to the Honorable Secretary of the Interior, to which was attached a copy of the agreement of July 1, 1925, between the [225] City and County of San Francisco, and Pacific Gas and Electric Company ("U. S. Exhibit 6"). Counsel for the plaintiff objected to the offer on the ground that said letter was incompetent as proof of any issue in the case, and irrelevant to any issue of the case. It was merely a communication to the Secretary expressing some personal views of the Solicitor,

(Testimony of John J. Dailey.)

and was not a communication which was ever proposed to or acted upon by the defendant, and therefore there could not have been any reliance upon it. In response to said objection counsel for the defendant made the following statement:

> Mr. O'Toole: It is offered, if your Honor please, for two reasons, the Secretary or the Assistant Solicitor was undoubtedly, at the request of the Secretary called upon to offer a legal construction of the contract between the City and the company, and therefore it was a contemporaneous construction of that particular document. Furthermore, it is a foundation and shows the reason for the letter of the Secretary, himself, addressed to Mayor Rolph under date, I think, of the 19th of August, which is now here in evidence as an exhibit ("U. S. No. 15") of the United States in this case.

Thereupon, the following occurred:

> Mr. Licking: If it is offered as a reason for showing somebody else did something I object to it on the ground that as to showing the reason for somebody else doing something it is quite obviously merely conjecture, and could have no relevancy and no bearing on any issue here.
>
> The Court: Is the matter submitted?
>
> Mr. O'Toole: Yes.
>
> The Court: The objection will be sustained.

(Testimony of John J. Dailey.)

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 11.

The document which was the subject of said ruling was thereupon marked as

"DEFENDANT'S EXHIBIT E"

for identification; it reads as follows:

"Department of the Interior
Washington.

Address only
Secretary of the Interior

July 20, 1925 [226]

The Honorable,
The Secretary of the Interior.

My dear Mr. Secretary:

There is before me, by reference from you, a certain contract executed on July 1, 1925, by duly authorized members of the Board of Public Works of the City and County of San Francisco, on the one part, and by the Pacific Gas and Electric Company, a corporation acting through its Vice-President and General Manager, thereunto duly authorized, on the other part. The contract, full copy of which is hereto attached, purports to provide for the utilization of certain electric energy owned by the party of the first part through the plant and equipment of the *part* of the second part,

(Testimony of John J. Dailey.)

as a temporary expedient, the occasion being the existence of a large amount of power owned by the City and County but not now available for consumption for the reason that the City and County own no distribution system of their own. The recitals in the contract quite fully explain the occasion, the purpose, and the methods of the plan for its immediate utilization.

I am asked whether this contract is a contract of sale. The question requires determination, because section 6 of the Raker Act (Act of December 19, 1913, 38 Stat., 242), under which the City and County of San Francisco acquired a franchise to develop and has developed this power, provides:

> That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

Assuming that the proviso refers to the franchise in its entirety ("rights hereby granted",

(Testimony of John J. Dailey.)

i. e., by the Act), and eliminating language not pertinent to the matter immediately to be considered, section 6 comes to this:

> That the grantee is prohibited from ever selling or letting to any corporation * * * * the right to sell or sub-let * * * * the electric energy sold or given to it * * * * by the said grantee.

This is a prohibition, the breach of which might be considered as a failure to observe one of the conditions specified in the Raker Act. And the proviso to paragraph "n" of Section 9 of the Act reads as follows: [227]

> That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings, in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.

The City having completed the Moccasin power plant as a part of the development of the Hetch Hetchy project, it now can deliver electric energy to the extent of 420,000,000 kilo-

(Testimony of John J. Dailey.)

watt hours to a point near Newark; but Newark is several miles from the City of San Francisco. The City owns no transmission line from Newark to the City. Nor does it own any distribution system in the City. The Pacific Gas and Electric Company owns both a transmission line and a distribution system. The City has started proceedings looking to the ultimate acquisition of this system. It has at present no funds with which to purchase or to build a system of its own. Consequently, there will be a great waste of electric energy and a great loss of potential revenue therefrom to the City and to taxpayers unless some plan within the power of the grantee under its franchise, the Raker Act, is devised for its present utilization. At least two years will elapse before the City, under favorable conditions, can be the owner of a distributing system capable of marketing the power which it owns. In this situation, the contract recites, the City "employs" the Company as its temporary distributor. The City agrees to produce, deliver, and consign all its energy output (save any such portion as may be reserved for certain city requirements). The Company agrees to take the entire energy output, to connect the City's transmission line with its own at Newark, installing all necessary equipment and meters for measurement, to transmit to San Francisco through its own sys-

(Testimony of John J. Dailey.)

tem so much of the same as may be required to light the streets and to meet other municipal requirements and to supply street railroads and other consumers, to furnish all necessary peak load and steam standby service, to collect for consumers the charges which shall not exceed lawfully established rates, and to make due accounting to the City. The contract provides for the exclusion of such portion of energy as the City may be required to furnish to irrigation districts or municipalities under the terms of the Raker Act. It is agreed that the transmission and distribution losses will amount to 24 per cent of the energy consigned to the Company at Newark. To arrive at the amount of compensation which the Company should receive for its service and the amount that the City should realize from the power so developed, transmitted, and consumed, the average revenue received by the Company from consumers in San Francisco in 1924 is taken as the basis: 2.383 cents per kilowatt hour. This rate is to be applied to 76 per cent of Newark energy. The Company is to collect from consumers [228] and is to account for and pay over to the City 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of energy consigned and delivered to it at Newark. The difference, i.e., 73.065 per cent x 2.383 cents x 76 per cent of Newark energy is to be retained by

(Testimony of John J. Dailey.)

the Company as its compensation for services under the contract. On this basis the City will receive something in excess of $2,000,000 annually. The contract recites that it is a temporary arrangement between the parties for the distribution of this electric energy to cover the period that must elapse before the City is in a position to attend directly to the distribution of its product. It may be terminated at any time by either party on one day's notice. The contract, of course, covers other points, none of which, however, bears materially upon its fundamental nature; and it is with that that I am concerned.

I am unable to say that this contract effects a sale of the energy to the Company. It certainly does not so appear on its face. It is rather to be described as a contract of agency. It does not import a transfer of the property in the electric energy to the Company for a price in money. From its terms alone, I can not reach the conclusion that the Company acquires an absolute title to the power it takes over and distributes. To be sure, possession will pass to the Company, but that would be true of an agency. A sale includes not only the idea of divesting a seller of title but of vesting such title in the buyer. I can not deduce that as a fact or an intention from the sole evidence of the transaction now before me, the contract.

(Testimony of John J. Dailey.)

Time alone will develop other evidential factors which may yield a certainty in conviction on that point: e. g., the manner in which the Company deals with the consumer. Will it bill the product sold in the name of the City, or in its own name as agent of the City, or in its own name as though it were the owner? These elements, factors of decision, are not present; and there are other things, incident to management or operation, which might have a bearing. They are not now present, I must take the contract as it is.

The contract certainly provides for the delivery by the City to the Company of its property, this energy. The Company takes the consignment which is to be sold to the consumer. It appears to be much like a consignment to a commission merchant. The liability of the Company is estimated on expected proceeds; at least, it is to account on a basis that contemplates the sale of the entire product to consumers. There might be room for some argument on this point inasmuch as the amounts to be divided between the City and the Company are computed on the amount delivered and consigned, with due allowance for customary loss. But when it is considered that *all* said energy will be used, consumed, and paid for by the ultimate purchaser, this provision in the contract loses much of its significance as

(Testimony of John J. Dailey.)

pointing to a sale. It is fundamental that to con- [229] stitute a sale there must be a transfer of title. If, under this contract, the Company acquires a title to the energy the minute it receives the same at Newark, then it would have the rights of ownership and could dispose of it as it pleased. I do not think it can be said from the evidence that the terms of the contract afford that this is so. I am constrained to the conclusion, judging the matter by the only factors now in being—i.e., the conditions and the terms of the agreement—that this is not a contract of sale or lease, but rather one of agency, and that no evidence of a violation of the inhibitions of section 6 of the Raker Act is presented by this contract; and I so advise you.

Respectfully yours,

C. EDWARD WRIGHT

(Signed) C. EDWARD WRIGHT

Acting Solicitor."

WILLIS O'BRIEN,

a witness for the defendant, being first duly sworn, testified as follows:

I am Supervisor of the Utility Audit in the office of the Controller of the City and County of San Francisco. I have been in that position about two and one-half years. Prior to that time I was the supervising accountant.

(Testimony of Willis O'Brien.)

Mr. Licking: Might I ask what sort of proof is going to be offered by this witness?

Mr. Holm: Yes. We wish to show the number of bond issues that were voted by the City and County of San Francisco for the building of the entire Hetch Hetchy water supply and power project.

Mr. Licking: That is from the inception?

Mr. Holm: From the inception of the project to 19.

Mr. Licking: Do you wish to show the number of bond issues or the amount involved?

Mr. Holm: The number of bond issues and the amount.

Mr. Licking: That has been reduced to statistical form, has it not?

Mr. Holm: Yes. [230]

Mr. Licking: We will object to said proof as incompetent, immaterial and irrelevant. The issue here, as we have said, is whether the city in its present activities under this contract is violating the terms of the Raker Act, and how much money the city may have spent upon the Hetch Hetchy project as a whole before or after this contract was entered into is entirely immaterial. It certainly is irrelevant on any issue and it certainly is not competent to prove or disprove any issue in this case. The objection is on the three grounds stated.

(Testimony of Willis O'Brien.)

Mr. Holm: We desire to show the equities on both sides and to show the actual interest that the City and County has, the tremendous actual monetary interest that it has in this water and power project, and it could not exist unless this expenditure had been made. And in conformity with your Honor's suggestion of last night I thought that this would bring down gradually the entire picture of what the City and County of San Francisco did toward constructing the Hetch Hetchy water and power project.

The Court: I will allow it over the objection and subject to a motion to strike.

The Witness: I have prepared a document of the kind mentioned in the discussion between counsel. The document consisting of three pages and bearing the title "Bonded Debt Limit" written on the letterhead of the Controller of the City and County of San Francisco and purporting to have been prepared by Willis O'Brien, and countersigned by Harold J. Boyd, Controller, was thereupon offered and received in evidence and marked

(Testimony of Willis O'Brien.)

"DEFENDANT'S EXHIBIT F".

It reads as follows:

"City and County of San Francisco
Office of the Controller

BONDED DEBT LIMIT
JULY 1, 1925

Assessment Roll 1924-1925	$684,099,920	
Fifteen per cent (15%) of which equals		$102,614,988
July 1, 1925, Bonded Debt Not Matured	$76,567,400	
Less Charter exemptions, 1912 Exposition Bonds	2,800,000	73,767,400
Margin		28,847,588
Unsold bonds subject to limit		16,115,000
Limit for future issues after sale of all currently authorized bonds		12,732,588

Prepared by

(Signed) WILLIS O'BRIEN

(Signed) HAROLD J. BOYD
Controller" [231]

"HETCH HETCHY WATER SUPPLY AND POWER PROJECT
BONDED DEBT
JULY 1, 1937

Date	Int. Rate	Authorized	Sold	Redeemed	Outstanding July 1, 1937
A-1909-1-1	4.5	$ 600,000	$ 600,000	$ 600,000	$ —
B-1910-7-1	4.5	45,000,000	45,000,000	16,990,000	28,010,000*
C-1925-1-1	5.0	10,000,000	10,000,000	2,000,000	8,000,000
D-1928-7-1	4.5	24,000,000	24,000,000	—	24,000,000
E-1932-6-1	V	6,500,000	6,500,000	—	6,500,000
F-1933-12-1	4.0	3,500,000	3,500,000	525,000	2,975,000
		89,600,000	89,600,000	20,115,000	69,485,000

(Testimony of Willis O'Brien.)

Date	Annual Redemption	Serial Maturity
A-1909-1-1	$ 100,000	1909-1915
B-1910-7-1	1,000,000	1920-1964
C-1925-1-1	250,000	1930-1969
D-1928-7-1	600,000	1938-1977
E-1932-6-1	(200,000	1939-1970
	(100,000	1971
F-1933-12-1	175,000	1937-1953

*Due and unpaid July 1, 1937 $1,010,000

Various interest rates, viz:

$4,325,000 at 5.75%	$280,000 at 4.0%
1,234,000 at 5.0 %	194,000 at 3.0%
143,000 at 4.5 %	324,000 at 2.75%

The work accomplished under the various bond issues was:

A Purchase of lands, water rights, etc.

B Main dams, mountain tunnels, Cherry and Moccasin power systems, Bay Crossing pipe and Pulgas tunnel.

C Foothill tunnel and shafts in Coast Range tunnel.

D Coast Range Tunnel and San Joaquin pipe and emergency pipes.

E Completion of Coast Range tunnel and Bay Crossing pipe and making payments to U. S. Government ($250,000 per annum in accordance with supplemental agreement)

F Enlargement of O'Shaughnessy Dam to ultimate height. Estimated to be completed shortly, say January 1938.

Prepared by

(Signed) WILLIS O'BRIEN

(Signed) HAROLD J. BOYD

Controller" [232]

"HETCH HETCHY WATER SUPPLY AND POWER PROJECT
BOND INTEREST
JUNE 30, 1937

	Total	1909 4½%	1910 4½%	1925 5%
Total Coupons Paid	$40,487,820.00	$72,900	$26,882,415.00	$4,641,125.00
Less: Interest Accrued to Date of Sale of Bonds	1,041,056.61		468,152.53	89,472.36
Net Coupon Payments	39,446,763.39	72,900	26,414,262.47	4,551,652.64
Add: Coupons due and Unpaid June 30, 1937	1,536,631.25		647,932.50	203,875.00
Add: Interest Accrued Not Due June 30, 1937	38,479.37			
Total Bond Interest to June 30, 1937	$41,021,874.01	$72,900	$27,062,194.97	$4,755,527.64

	1928 4½%	1932 (Various Rates)	1933 4%
Total Coupons Paid	$ 7,088,287.50	$1,532,312.50	$270,780.00
Less: Interest Accrued to Date of Sale of Bonds	388,931.54	32,647.41	61,852.77
Net Coupon Payments	6,699,355.96	1,499,665.09	208,927.23
Add: Coupons Due and Unpaid June 30, 1937	553,095.00	80,508.75	51,220.00
Add: Interest Accrued Not Due June 30, 1937		28,562.71	9,916.66
Total Bond Interest to June 30, 1937	$ 7,252,450.96	$1,608,736.55	$270,063.89

Prepared by
(Signed) WILLIS O'BRIEN

(Signed) HAROLD J. BOYD
Controller" [233]

(Testimony of Willis O'Brien.)

The witness (continuing):

The total amount of the bond issue voted for the Hetch Hetchy project was $89,600,000.00.

In the Exhibit just received the date of the bonds is shown; for example, the bonds of the 1909 issue, January 1st, and of the 1910 issue, July 1st. Of course, the elections authorizing these bonds were held some time before. The Exhibit shows that the bonded debt limit of San Francisco on July 1, 1925, for future issue (after the sale of all currently authorized bonds), was $12,732,588.00. On the last page of the Exhibit there is a schedule which shows the total bond interest to June 1, 1937, with the detail there as to the issues. The grand total of interest that has been paid is $41,021,874.01.

IGNATIUS DWYER,

a witness for the defendant being first duly sworn, testified as follows:

I am Chief Deputy Registrar of Voters of the City and County of San Francisco. I have held that position for about twenty-five years. I have prepared and have with me a statement showing the number of bond issues that were proposed to the voters of the City and County of San Francisco for the Hetch Hetchy project, as well as the revenue bonds by which ex-

(Testimony of Ignatius Dwyer.)

tensions could have been built and charter amendments relating to the same subject. The statement is dated October 18, 1937, and is signed by C. J. Collins, Registrar of Voters, and certified under seal.

Counsel for the defendant then offered said statement in evidence. Counsel for the plaintiff objected to the offer. Thereupon the following occurred:

Mr. Licking: I object to the evidence as embodied in this memorandum on the ground that as a whole and considered singly, the sum of the items, nor any of the items of the information themselves constitute matter that is either material or relevant to any issue before the Court, or competent to prove or disprove any allegation in the complaint or in the answer. This is a matter of what the city has done. This is an attempt to show what the city has done, in an attempt to do something else instead of that which it is now doing, and that which it is now doing is the thing which is before the Court, and it seems to me clearly that all of these attempts that the city may have made to do something are certainly immaterial to the issue whether what the city is doing is in violation of the Raker Act. I object on [234] the ground stated.

Mr. Holm: In addition to the ground that I have heretofore stated as to the admission

(Testimony of Ignatius Dwyer.)

of this general information for the Court and for the record to be hereafter maintained in this case, I feel that this is quite competent evidence. It shows that every effort was made in behalf of the City and County of San Francisco to actually acquire a distribution system of its own, and it shows, and after explanatory statements have been made by this witness, will show what the issues were proposed for, and it is quite material and relevant to the conduct of the Hetch Hetchy water and power system.

The Court: The Court cannot conceive that this has any relation to any issue here involved in this case. If it has I would like to have someone point it out.

Mr. Holm: It has been suggested by Secretary Ickes that these very steps would be agreeable to him, and further than that, it shows the constant acts on the part of the City and County of San Francisco to reasonably comply, as I stated, with the Raker Act; and upon that theory I think, under the ruling of your Honor last evening, it should be accepted in evidence.

Mr. Licking: There is no evidence before the Court that the Secretary suggested anything of the sort, unless it came in at some time I was out of the courtroom; and I do not remember having been out of the courtroom. It would seem to me that such a suggestion would

(Testimony of Ignatius Dwyer.)

not be germane or material if it had been made. But it seems to me that whether a reasonable compliance is concerned, if it is material at all, it would be proper to show that they wanted to do something else besides what it was doing. But I cannot see what relevancy that has to the question before the Court, that is, what they are doing, not what they tried to do. This is an attempt to prove what the city tried to do. I have not any doubt that there have been various bond issues and one thing and another, but I cannot see that the good faith of the city in attempting to do something else except what it is doing has anything to do with the question before us.

The Court: I will sustain the objection.

Counsel for the defendant thereupon duly excepted to said ruling of the Court. Said ruling and exception are hereby designated Ruling and Exception No. 12.

The statement which was the subject matter of said ruling was thereupon marked, for identification, as

(Testimony of Ignatius Dwyer.)

"DEFENDANT'S EXHIBIT G"

for identification. It reads as follows: [235]

"Power Distribution Propositions"	Vote For	Vote Against	Total	Vote Necessary to Carry
November 8, 1927. $2,000,000 Transmission line bonds	57,607	55,940	113,547	75,698
November 6, 1928 Revenue bonds Charter Amendment.	26,076	103,495	129,571	64,786
August 26, 1930 Purchase— Pacific Gas & Electric Co. *$44,600,000	25,383	63,638	89,021	59,348
Purchase Great Western Power *$18,945,000	25,256	63,387	88,643	59,096
Transmission line from Newark *$3,525,000	25,788	61,972	87,760	58,507
Red Mountain Bar Hydro-Electric Plant *$1,045,000	26,001	61,422	87,423	58,282
Total *$68,115,000				59,348
November 8, 1932 Loans Payable from Water Revenue. Charter Amendment	66,532	89,220	155,752	77,877
November 7, 1933 Red Mountain Power Plant and San Francisco Distributing System	71,746	73,010	144,756	96,504
May 2, 1935 Revenue Bonds Charter amendment	50,804	72,780	123,584	61,793
March 9, 1937 Revenue Bonds Charter Amendment	65,762	78,101	143,863	71,932

(Testimony of Ignatius Dwyer.)

I hereby certify that the above is a true and correct copy of the votes cast for and against each Proposition Bond and Charter Amendment on the respective dates stated above.

(Sgd.) C. J. COLLINS

Registrar of Voters

San Francisco

October 18, 1937. (Seal)." [236]

Thereupon, in connection with said "Exhibit G for Identification", counsel for the defendant asked that portions of seven several pamphlets dealing with propositions to be voted on at elections to be held November 8, 1927, November 6, 1928, August 26, 1930, November 8, 1932, November 7, 1933, May 2, 1935 and March 9, 1937, respectively, which were explanatory of said "Defendant's Exhibit G for Identification" and of the ten proposals voted upon at the elections therein mentioned, be considered as offered in connection with said Exhibit and marked as a part thereof for the purpose of identification. Said pamphlets were thereupon marked as part of said "Defendant's Exhibit G for Identification."

The portions of said respective pamphlets so offered as part of

"DEFENDANT'S EXHIBIT G

for Identification" and the proposition with which the same were concerned, are as next stated:

(a) Pages 53 to 59, inclusive, of the first of said pamphlets, dealing with a proposition (No.

(Testimony of Ignatius Dwyer.)

3) to be voted upon at said election of November 8, 1927. Said proposition was one to incur a bonded debt of the City and County of San Francisco to the amount of $2,000,000.00 for the purpose of acquiring, constructing and completing an extension of the Moccasin Creek power line of the Hetch Hetchy water and power project of said City and County of San Francisco from its then terminal at Newark, Alameda County, California, over, under, across or around the Bay of San Francisco, and thence by the most feasible route into the City and County of San Francisco, for the purpose of transmitting electric energy generated at Moccasin Power Plant into the City and County of San Francisco.

(b) Pages 18 to 24, inclusive, of the second of said pamphlets, dealing with a proposed Charter Amendment (No. 23), to be voted upon at said election of November 6, 1928. Said proposed Charter Amendment provided for the acquisition, construction or extension of public utilities and the issuance of bonds therefor which should be payable both as to principal and interest wholly from the revenues of said utility.

(c) Pages 4 to 13, inclusive, of the third of said pamphlets, dealing with a proposition (No. 1) to be voted upon at said election of August 26, 1930. Said proposition was one to

(Testimony of Ignatius Dwyer.)

incur a bonded debt of the City and County of San Francisco, to the amount of $44,600,000.00 for the acquisition of the electric [237] generating and distribution system of Pacific Gas and Electric Company and all lands of said Company within and without the confines of the City and County of San Francisco, and all its properties and equipment necessary for the conduct of such system.

(d) Pages 14 to 23, inclusive, of the third of said pamphlets, dealing with a proposition (No. 2) to be voted upon at said election of August 26, 1930. Said proposition was one to incur a bonded debt of the City and County of San Francisco to the amount of $18,945,000.00 for the acquisition of the electric generating and distributing system of The Great Western Power Company of California, and all lands of said Company within and without the confines of the City and County of San Francisco, and all of its properties and equipment necessary for the conduct of such system.

(e) Pages 24 to 33, inclusive, of the third of said pamphlets, dealing with a proposition (No. 3), to be voted upon at said election of August 26, 1930. Said proposition was one authorizing the incurring of a bonded debt of the City and County of San Francisco, in the sum of $3,525,000.00 for the purpose of acquiring, constructing and completing a double circuit high volt-

(Testimony of Ignatius Dwyer.)

age electric transmission line from Newark, Alameda County, California, to the City and County of San Francisco, and all necessary rights of way therefor, to raise the transmission voltage of the Pacific Gas and Electric Company's stepdown station in Visitacion Valley, San Mateo County, California, adequate to handle the electric power generated from the plants of the City and County of San Francisco; and to regulate voltage, correct power factor, stabilize lines and other related and incidental matters.

(f) Pages 34 to 42, inclusive, of the third of said pamphlets, dealing with a proposition (No. 4) to be voted upon at said election of August 26, 1930. Said proposition was one authorizing the incurring of a bonded debt of said City and County to the amount of $1,045,000. for the acquisition, construction and completion of the lands, power house and all necessary equipment, materials and supplies for the purpose of developing hydro-electric energy at Red Mountain Bar in Tuolumne County, California, where the Hetch Hetchy aqueduct of the City and County of San Francisco passes under the Don Pedro Reservoir.

(g) Pages 12 to 17, inclusive, of the fourth of said pamphlets, dealing with a proposed Charter Amendment (No. 4), to be voted upon at said election of November 8, 1932. Said pro-

(Testimony of Ignatius Dwyer.)

posed Charter Amendment would add a new section 129.1 to the Charter of the City and County of San Francisco, which would permit the Public Utilities Commission to borrow money for the construction or reconstruction of improvements to the Water Department to the extent of $5,000,000.00, to be repaid [238] solely out of the revenue of said utility.

(h) Pages 11 to 14, inclusive, of the fifth of said pamphlets, dealing with a proposition (No. 3) to be voted upon at said election of November 7, 1933. Said proposition was one to incur a bonded debt of the City and County of San Francisco in the sum of $6,308,000.00 for the construction of a power plant at Red Mountain Bar in Tuolumne County, California, and a system in the City and County of San Francisco, for the distribution of the electric energy generated on the Hetch Hetchy system, including necessary substations and standby plants, lands and rights of way.

(i) Pages 3 to 13, inclusive, of the sixth of said pamphlets, dealing with a proposition (No. 1) to be voted upon at said election of May 2, 1935. Said proposition was one to amend the Charter of the City and County of San Francisco by adding thereto a new section to be numbered Section 121.1 providing for the acquisition, construction and completion or extension of public utilities by funds provided by

(Testimony of Ignatius Dwyer.)

the issuance of bonds or other obligations, the principal of which, and the interest on which, would be payable wholly from the net revenues of the utilities so acquired or extended.

(j) Pages 2 to 9, inclusive, of the seventh of said pamphlets, dealing with a proposed Charter Amendment (No. 1), to be voted upon at said election of March 9, 1937. Said proposed Charter Amendment would amend the Charter of the City and County of San Francisco by the addition of a new section to be numbered 121.1 providing for the borrowing by the Public Utilities Commission of the City and County of San Francisco through the issuance of revenue bonds or other evidences of indebtedness payable wholly out of revenue, in such amount or amounts, as might, in the judgment of said public utilities commission, be necessary to meet the cost of acquiring a system for the generation and distribution to the people of the City and County of San Francisco or to the people of any territory adjacent to or adjoining said city and county, of the hydro-electric power generated in the Hetch Hetchy project, up to but not exceeding in the aggregate the sum of $50,000,000.00.

Because of their length it is impracticable herein to set forth in full the ten propositions voted upon at the seven elections above mentioned, as contained in said seven pamphlets, or to state the substance

(Testimony of Ignatius Dwyer.)

of said propositions more specifically than they are hereinbefore stated. All of the provisions of said respective propositions are incorporated herein, by reference; however, and the original pamphlets [239] containing the same (which, with the aforesaid statement of C. J. Collins, Registrar of the City and County of San Francisco, California, dated October 18, 1937, constitute "Defendant's Exhibit G for Identification"), will be physically transmitted to the United States Circuit Court of Appeals with and as a part of the record on appeal.

WILLIAM H. NANRY,

a witness for the defendant, being first duly sworn, testified as follows:

I am a resident of San Francisco and I am Director of the San Francisco Bureau of Governmental Research, the function of which is to act as a taxpayers' agency in the interest of economy and efficiency in the City Government. Part of the function of the Bureau and of my duties is to familiarize myself with the records of the City Government pertaining to its bond capacity, tax rates, income and expenditures and the various projects that the City has under consideration in its governmental capacity. I have prepared a statement showing the assessment roll, debt limitation,

(Testimony of William H. Nanry.)

bonded debt subject to limitation and the leeway for new debts of the City and County of San Francisco for the years 1924, 1925 to date, as shown by the records of the Controller of the City and County of San Francisco. Said statement correctly sets forth the results of the compilation.

Thereupon the following occurred:

Mr. Searls: I desire to offer this exhibit in evidence, showing the leeway that the city has had for each of these years, the bonded debt by which it might acquire a publicly-owned distribution system.

Mr. Licking: To which I object upon the ground that whether the City and County of San Francisco is or has been in a position to acquire a publicly-owned distribution system or whether it should is not in issue in this case. It is utterly irrelevant, and immaterial.

The Court: The objection is sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 13.

[240]

Said statement was thereupon marked for identification as

(Testimony of William H. Nanry.)

DEFENDANT'S EXHIBIT H

for Identification"; it reads as follows:

"[October 1937]

(a)	Assessment Roll	Debt Limitation	Bonded debt Subject to Limitation	Leeway for New Debt	Non Limit Debt Charge on Taxpayers
1924-25	$684,099,920	$102,614,988	$89,823,400	$12,791,588	
1927	Bonds Authorized	Memorial Hall		4,000,000	
		Bernal Cut		1,400,000	
		Boulevard		9,380,000	
1928		Hetch Hetchy			$24,000,000
1929		Hospital		3,500,000	
		Sewer		2,200,000	
		sub-total		20,480,000	24,000,000
(b)					
1929-30	1,196,439,062	143,572,687	53,009,400	90,563,287	
1931	Bonds Authorized	sub-total above		20,480,000	24,000,000
		County Jail		850,000	
		Unemployment, Park, Playground, Streets		2,500,000	
1932		Relief		6,500,000	
		Hetch Hetchy			6,500,000
1933		Sewers		2,625,000	
		High Pressure		2,000,000	
		Airport		260,000	
		School		3,000,000	
		total		38,215,000	30,500,000
(c)					
1937-8	991,119,933	118,934,392	48,706,600	70,227,792"	

(Testimony of William H. Nanry.)

Thereupon the following occurred:

Mr. Searls: Q. Mr. Nanry, assuming that the in- [241] come from the hydro-electric energy marketed through the contract in question has averaged something in excess of $2,200,000 annually per year, can you state what the net effect upon the taxpayers of San Francisco would be if there was a cancellation of this contract and that income were cut off?

At the request of the Court, after objection to said question had been made by counsel for the plaintiff, on the ground that the proposed testimony was incompetent, irrelevant and immaterial, counsel for the defendant made the following statement of the purpose for which said offer was made:

Mr. Searls: The purpose of the offer is to show the balance of equities in this situation, that the City of San Francisco and its taxpayers will suffer a tremendous loss if your Honor should grant an injunction in this case, that the Government will suffer no loss whatever, and that in a case where there is a doubt as to the meaning or construction of a provision of the statute or a contract, the court should take into consideration the effect of injunctive relief upon the parties.

Whereupon the Court overruled the objection of counsel for the plaintiff, subject to a motion to strike out the witness's answer.

(Testimony of William H. Nanry.)

(The Witness): If that income would not be available from the agency agreement it would have to be made up by taxation and would require an increase of about 28 cents in the tax rate; that is 28 cents for $100.00 of assessed valuation, based upon the current assessment roll of the City and County of San Francisco.

In connection with the testimony of the witness, counsel for the plaintiff stated that he did not object to the questions put to the witness on the ground of any lack of qualification of the witness.

PAUL J. OST,

a witness for the defendant, being first duly sworn, testified as follows:

At the present time, I am Manager and Chief Engineer of the Electrical Power Bureau of the Public Utilities Commission. I have been in the city's employ between twenty-eight and twenty-nine years. My position is that of electrical engineer.

Counsel for the plaintiff thereupon stipulated that the witness [242] was competent to testify as an expert on electrical engineering matters.

The witness (continuing):

In connection with my work on the Hetch

(Testimony of Paul J. Ost.)

Hetchy project I have become familiar with the power construction features of that project.

Thereupon the following occurred:

Mr. Searls: Q. Prior to the making of this contract between the City and County of San Francisco and the Pacific Gas & Electric Company did you cause an inquiry to be made of the Modesto & Turlock Irrigation Districts as to whether it desired to purchase any electrical energy from the City and County of San Francisco in conformity with the provisions of Section 9 (l) of the Raker Act?

At the request of the Court counsel for the defendant read Section 9 (l) of the Raker Act.

Thereupon there was a discussion by counsel for plaintiff and counsel for the defendant with respect to the pending question. In the course of said discussion a recess was taken until Thursday, October 21, 1937, at ten o'clock A.M.

Thursday, October 21, 1937, 10 o'clock A.M.

The discussion was resumed by counsel. [243]

Counsel for the defendant thereupon offered in evidence a photostatic copy of Resolution No. 23723 (New Series) of the Board of Supervisors of the City and County of San Francisco, in connection with said offer summarized the provisions of said resolution. In so doing, he stated that said resolution solicited offers for the purchase of the whole or part of any electric energy of the Hetch Hetchy

(Testimony of Paul J. Ost.)

project by any municipality, municipal water system or irrigation district, delivery to be made at any point on the Hetch Hetchy transmission line at the voltage and frequency mentioned in the preamble and further stated that the solicitation contained in the resolution was made prior to the execution of the contract of July 1, 1925.

Counsel for the plaintiff objected to said offer, upon the ground that the Resolution is irrelevant, incompetent and immaterial, and not within the issue of the case.

The Court sustained said objection, and counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 14.

The resolution, which was the subject matter of said ruling was thereupon marked for identification as

"DEFENDANT'S EXHIBIT I for Identification"; it reads as follows:

"RESOLUTION No. 23723 (NEW SERIES), as follows:

Whereas, the City Engineer has reported that on or shortly after April 1, 1925, there will be available for delivery at Newark, California, 360,000,000, more or less, kilowatt hours annually, of three-phase electric energy to be generated at the Moccasin Creek Power House on the Hetch Hetchy project (assuming a load factor

(Testimony of Paul J. Ost.)

of 65 per cent), said energy having a voltage of 154,000 volts and a frequency of 60 cycles; and

Whereas, the Raker Act requires the City and County to sell or offer for sale so much of said electric energy, as is not required for municipal purposes under certain limitations prescribed in said act; now, therefore,

Resolved, That the City and County of San Francisco does hereby solicit offers for the purchase of the whole or any part of said electric energy by any municipality, municipal water district or irrigation district, [244] delivery to be made at any point on the Hetch Hetchy transmission line at the voltage and frequency mentioned in the preamble hereof, and any contract to be subject to the terms and conditions of the Act of Congress of December 19, 1913, commonly known as the Raker Act. Such offers must be presented in writing to the Board of Supervisors, City Hall, San Francisco, on or before the 30th day of March, 1925, at 3 o'clock p. m., and must be accompanied by a statement of the plan and arrangements which the bidder contemplates following in taking delivery of said energy and transmitting the same to the place of intended use. Be it

Further Resolved, That the Clerk of the Board be and he is hereby directed to advertise this offer for ten days in the official newspaper.

(Testimony of Paul J. Ost.)

Adopted by the Board of Supervisors, Marc 9, 1925.

Ayes—Supervisors Badaracco, Bath, Colman Deasy, Harrelson, Hayden, Katz, McGregor Morgan, Robb, Roncovieri, Rossi, Schmitz Shannon, Welch, Wetmore—1*y*.

Absent—Supervisors McLaren, McSheehy—2

J. A. DUNNIGAN

Clerk.

Approved March 11, 1925.

R. McLERAN,

Acting Mayor."

Counsel for the defendant next offered in evidence a certified copy of resolution No. 21398 (New Series), of the Board of Supervisors of the City and County of San Francisco, and, in connection with said offer, summarized the provisions of said resolution. In so doing he stated that the Resolution directed the City Engineer to ascertain from the power companies operating in San Francisco the terms under which the total output in electrical energy from the Hetch Hetchy project could be marketed through an agency agreement and the price at which each corporation would grant an option to the City to buy its distribution system and standby plants and whether it would be willing to sell its distribution system and standby plants on a pay-as-you-go plan.

(Testimony of Paul J. Ost.)

Counsel for the plaintiff objected to the offer on the ground that said Resolution was irrelevant, incompetent and immaterial, and not within the issues of the case. [245]

In response to a request by the Court for a statement of the purpose of the offer, counsel for the defendant made the following statement:

> Mr. Searls: The purpose of the offer is to show an attempt of the City and County of San Francisco to complete the distribution of electric energy under terms that might be most favorable to the city, including the acquisition of a publicly owned plant by purchase from the corporation which owned it.

The Court sustained the objection to said Resolution, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are hereby designated as Ruling and Exception No. 15.

Thereupon the Resolution which was the subject of said ruling was marked as

"DEFENDANT'S EXHIBIT J

for Identification". It reads as follows:

"RESOLUTION No. 21398 (NEW SERIES), as follows:

Whereas, The City and County of San Francisco is confronted with the problem of determining what disposition shall be made of the 82,500 kilowatt output of hydro-electric energy

(Testimony of Paul J. Ost.)

to be generated at the Moccasin Creek power plant on the Hetch Hetchy project prior to December 31, 1924, and transmitted over the City's transmission line to the bay region; and

Whereas, The City Engineer has recommended in his report dated April 4, 1923, that as an aid in deciding this question information be obtained from the Pacific Gas and Electric Company and Great Western Power Company as to the terms upon which said electric energy can be marketed through said corporations, or either of them, if it should be decided to market it through private agencies;

Whereas, It seems equally necessary to ascertain and know the prices at which the distribution systems in San Francisco of each of said corporations could be acquired by the City and County, if it should be decided to market said electricity through a system to be acquired and owned by the City itself; now, therefore, be it

Resolved, That the City Engineer be and he is hereby requested and directed to ascertain from each of said power companies and report to this Board at the earliest possible moment;

(1) The terms under which the total output in electric energy from the Hetch Hetchy project could be marketed through the agency of either or both of said corporations [246] for a period not exceeding ten years from and after the same shall be available for distribution.

(Testimony of Paul J. Ost.)

(2) The price at which each of said corporations would be willing to sell to the City and County of San Francisco such portions of its distribution system in said City and County as may, in the opinion of the City Engineer, be adapted to the distribution by the City of such electric energy, including the necessary plants for furnishing steam standby service.

(3) The period of time for which each of said corporations would be willing to grant an option to the City and County to purchase said distribution system and standby plant at said prices.

(4) Whether or not either of said corporations would be willing to sell their said local distributing systems and standby plants to the City and County on a pay-as-you-go plan, and, if so, on what terms; and be it

Further Resolved, That the City Engineer be and he is hereby further requested to furnish this Board with an itemized estimate of the cost of building a complete distribution and standby system for the marketing and distributing of said electric energy independently of existing plants.

Adopted by the Board of Supervisors July 30, 1923.

Ayes: Supervisors Bath, Colman, Deasy, Hayden, McGregor, McLeran, McSheehy, Mor-

(Testimony of Paul J. Ost.)

gan, Mulvihill, Robb, Rossi, Schmitz, Scott, Shannon, Welch, Wetmore—16.

Absent: Supervisors Hynes, Powers—2.

J. S. DUNNIGAN,

Clerk.

Approved August 7, 1923.

JAMES ROLPH, JR.,

Mayor."

Counsel for the defendant next offered in evidence the correspondence between the City and the Pacific Gas and Electric Company and Great Western Power Company with respect to the City's solicitation of offers from said power companies in accordance with the aforesaid Resolution. Counsel for the plaintiff objected to said offer upon the ground that it was incompetent, irrelevant and immaterial, and not within the issues of the case. The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 16. [247]

Said correspondence consists of a letter from the City Engineer of San Francisco to each of the power companies named above, and the replies of said respective power companies to said respective letters. Said letters were collectively marked for identification as

(Testimony of Paul J. Ost.)

"DEFENDANT'S EXHIBIT K

for Identification"; they read respectively as follows:

"City and County of San Francisco
Department of Public Works
Bureau of Engineering

August First
1923

Office of
Hetch Hetchy Water Supply
Hetch Hetchy Railroad

Pacific Gas and Electric Company
140 Sutter Street
(Attention Mr. Wigginton Creed)
and
Great Western Power Company of California
530 Bush Street
San Francisco, California
(Attention Mr. Mortimer Fleishhacker)

Gentlemen:

By resolution of the Board of Supervisors of the City and County of San Francisco adopted July 30, 1923, I am requested and directed to confer with your company with a view to ascertaining the following information affecting the distribution of hydro-electric power from the Moccasin Creek plant on the Hetch Hetchy Project:

1. The terms under which the total output in electric energy from the Hetch Hetchy pro-

(Testimony of Paul J. Ost.)

ject could be marketed through the agency of your company for a period not exceeding ten years from and after the same shall be available for distribution;

2. The price at which your company would be willing to sell to the City and County of San Francisco such portions of its distribution system in said City and County as may, in the opinion of the City Engineer, be adapted to the distribution by the City of such electric energy, including the necessary plants for furnishing steam standby service;

3. The period of time for which your company would be willing to grant an option to the City and County to purchase said distribution system and standby plant at said prices;

4. Whether or not your company would be willing to sell its local distributing system and standby plants to the City and County of San Francisco on a pay-as-you-go [248] plan, and if so, on what terms.

In pursuance of this direction from the Board of Supervisors I shall be glad of an opportunity to confer with you with a view to outlining the general principles which will govern your company in supplying the information requested, and also to establishing some satisfactory line of procedure for working out the desired data.

(Testimony of Paul J. Ost.)

I shall ask one or more of my assistants and Mr. Searls, our legal advisor, to attend the conference with me, if you will kindly designate a date and hour which will be convenient to you.

Yours very truly,
(Signed) M. M. O'SHAUGHNESSY,
City Engineer."

"Great Western Power Company
of California
530 Bush Street
San Francisco

September 7, 1923.

Mr. M. M. O'Shaughnessy
City Engineer
City Hall, Civic Center
San Francisco, California

Dear Sir:

Your letter of August 1st, requesting information in reference to the disposal of the hydro-electric power from the Moccasin Creek Plant of the Hetch Hetchy Project, has been receiving our earnest attention.

Answering the first question of your letter, from the information we have at hand it would appear that the total output from the Moccasin Creek Plant is worth approximately $2,000,000

(Testimony of Paul J. Ost.)

per annum, and on this basis this Company would consider purchasing a substantial portion for distribution.

This plan would immediately place the Hetch Hetchy Project on a revenue producing basis, and eliminate the long period of many years duration which the City would require for building up and connecting a load to a new distribution system.

We have been giving considerable study to the possibility of the sale to the City and County of San Francisco of the distribution system of this Company lying within the City and County, including the standby steam generating plants. [249]

The determination of proper severance charges has assumed a position of extreme importance in placing a total value on these properties. The physical problem involving separation of the steam heat system properties, the San Mateo County distribution properties which are served through the San Francisco system, and the many legal and financial questions involved on account of all our properties being covered by bond issues, all combined to make it extremely difficult to arrive at a definite answer, and we cannot give one at this time.

We wish to assure you of our earnest desire to be helpful to you and the City and County

(Testimony of Paul J. Ost.)

in working out the problem which you are facing in connection with the above matter.

Very truly yours,

(Signed) J. B. BLACK

Vice President and General Manager."

JBB:U

"Pacific Gas and Electric Company
445 Sutter Street
San Francisco, California

September 9, 1923

Wigginton E. Creed
President

M. M. O'Shaughnessy, Esq.
City Engineer of San Francisco
San Francisco, California

Dear Sir:

We have given full and careful consideration to the request contained in your letter of August 1, 1923, for information related to the distribution of electric energy generated at the Moccasin Creek plant of the Hetch Hetchy project, and submit to you herewith our answer.

1. For many years this company has marketed and distributed, in addition to its own large supplies, the surplus electric power of other companies and even of isolated generating plants. This policy, by consolidating and coordinating effort, has proved to be a potent factor in placing California in a premier posi-

(Testimony of Paul J. Ost.)

tion in the power industry. We are ready, if the city wishes it, to continue this policy as to any power which the city may find it desirable to market. If the city should decide to market its power through the medium of an existing public utility, it seems to us that agreement should be reached through negotiations by representatives of the city, vested with the necessary power to act, with representatives of the public utility. It is our belief that such an arrangement would bring to the city a revenue of not less than $2,000,000.00 per an- [250] num, dependent upon the precise disposal of technical details.

2. We are not in a position to offer our distributing system in the city of San Francisco for sale.

The generating, transmission and distribution system of this company has been developed through a long period of years until it constitutes today an integrated whole designed for and devoted to the service not simply of territory within municipal boundaries but of a great section of the State of California without regard to municipal boundaries, and service in any one portion of this section of the state is directly related to service in every other portion thereof.

3. You, of course, appreciate that the answer given to your Question No. 2 serves fully

(Testimony of Paul J. Ost.)

to answer your Questions Nos. 3 and 4.

Respectfully submitted,

(Signed) WIGGINTON E. CREED

President."

Counsel for the defendant next offered in evidence a certified copy of Resolution No. 21,178 (New Series) of the Board of Supervisors of the City and County of San Francisco, declaring that said City and County, in entering into the contract of July 1, 1925, would, notwithstanding said contract, always stand ready to serve the Modesto and Turlock Irrigation Districts under the terms of the Raker Act.

In connection with said offer counsel for the defendant stated that in response to the previous solicitation to said Modesto Irrigation District contained in "Defendant's Exhibit I for Identification" said District had replied stating that it might require standby service some day, and that the contract of July 1, 1925 ("U. S. Exhibit No. 6") contains a proviso that if the City is ever required to furnish power to said Irrigation District, the amount required therefor may be excepted from the contract.

Counsel for the plaintiff objected to the offer of said Resolution [251] No. 21,178 (New Series) upon the ground that it was incompetent, irrelevant and immaterial, and not within the issues of the case.

At the request of the Court, counsel for the

(Testimony of Paul J. Ost.)

defendant read Section 2 of the contract of July 1, 1925 ("U. S. Exhibit No. 6").

Supplementing the objection theretofore made to the offer of said Resolution, counsel for the plaintiff further objected to said Resolution upon the ground that it was merely a declaration of policy by the City of San Francisco.

The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 17.

Said Resolution which was the subject of said ruling was thereupon marked for identification as

"DEFENDANT'S EXHIBIT L"

for Identification". It reads as follows:

"RESOLUTION No. 21178. (NEW SERIES.)

Whereas, The City and County of San Francisco is under legal obligations, under the terms of Section 9, subdivisions L and M of the Act of Congress of December 19, 1913, commonly known as the Raker Act, to sell to the Modesto and Turlock Irrigation Districts, upon their request, and also to municipalities within either or both the said Irrigation Districts, electrical energy for irrigation and public municipal purposes within those Districts, at prices to be fixed under the laws of California or in the absence of such laws, at prices approved by

(Testimony of Paul J. Ost.)

the Secretary of the Interior, said prices not to be less than will return to the City of San Francisco the actual total costs of providing and supplying said power, said cost to be computed in accordance with currently accepted practice of public cost accounting, including a fair proportion of the cost of conduits, lands, dams, and water supply system, and said prices not to be greater than those which will actually reimburse the City and County of San Francisco for developing and maintaining and transmitting electrical energy thus sold; and

Whereas, The Board of Directors of the Modesto Irrigation District has requested the City and County of San Francisco to make a declaration of the policy which it will follow with respect to fulfilling its obligations toward said District under said terms of the Raker Act, with special reference to the furnishing of a standby service to said District at a point therein, to be hereafter selected, and also to supplying such electrical energy as may be [252] needed by said District during periods of low water or water shortage at the Don Pedro power house; and

Whereas, The City Engineer has reported to this Board that the City can make such a declaration of policy without imperiling or handicapping its interests in future arrange-

(Testimony of Paul J. Ost.)

ments for the disposal of the hydro-electric power generated on the Hetch Hetchy project;

Now, Therefore, Be It Resolved, That it will be the policy of the City of San Francisco to furnish such standby electric service as may be required by the Modesto Irrigation District and such electric energy as may be required by said District, not exceeding amounts to be hereafter agreed upon, the terms and conditions under which such service shall be rendered to be a matter for future negotiation between the representatives of the District and those of the City and County of San Francisco; be it further

Resolved, That any policy which the City and County of San Francisco shall hereafter adopt with reference to the disposal of hydro-electric energy generated on the Hetch Hetchy Project shall have due regard to the service to the Modesto Irrigation District herein provided for; and be it further

Resolved, That the Clerk of the Supervisors be and he is hereby directed to transmit a certified copy of this Resolution to the Board of Directors of the Modesto Irrigation District.

Adopted—Board of Supervisors, San Francisco, May 28, 1923.

Ayes: Supervisors Bath, Colman, Deasy, Hayden, Hynes, McGregor, McLeran, Mc-

(Testimony of Paul J. Ost.)

Sheehy, Morgan, Mulvihill, Powers, Robb, Rossi, Schmitz, Scott, Shannon, Welch, Wetmore.

J. S. DUNNIGAN,

Clerk.

Approved, San Francisco, May 29, 1923.

R. McLERAN,

Acting Mayor."

The witness Mr. Ost (Continuing):

The Early Intake plant was placed in operation in the Spring of 1928 for the purpose of supplying power in the construction of the O'Shaughnessy Dam and in driving the aqueduct tunnels in connection with the development of the Hetch Hetchy water. The amount of power taken from that plant fluctuated quite widely as demands for construction power came on or went off. That condition resulted in there being surplus power practically at all times.

[253]

In or about the year 1918, the City Engineer of San Francisco received an order from Federal Power Administrator of California with respect to that power.

Upon receipt of that order the City made a connection with the line of the Sierra and San

(Testimony of Paul J. Ost.)

Francisco Power Company through this connection. The Sierra and San Francisco Power Company was subsequently merged with or purchased by Pacific Gas and Electric Company.

The witness thereupon identified a photostatic copy of a document dated September 18, 1918, signed by H. G. Butler, as the order referred to, and stated: "That is the document Mr. Butler delivered to me". He was the Federal Power Administrator during the War.

Counsel for the defendant thereupon offered said document in evidence and it was received in evidence and marked

"DEFENDANT'S EXHIBIT M";

it reads as follows:

"Railroad Commission
of the
State of California
Tenth Floor, Commercial Building
833 Market Street
San Francisco
Office of Power Administrator

470-5

Edwin O. Edgerton, Commissioner, Pres.
H. D. Loveland, Commissioner
Alex Gordon, Commissioner

(Testimony of Paul J. Ost.)

Frank R. Devlin, Commissioner
Harry A. Encell, Examiner
Myron Westover, Examiner
R. A. Pabst, Asst. Secretary
W. P. Geary, Rate Expert
Richard Sachse, Chief Engineer
L. R. Reynolds, Auditor
W. C. Fankhauser, Bond Expert
Douglas Brookman, Attorney

Telephone Sutter 2260
Address All Communications to
Railroad Commission of the State
of California

September 18, 1918.

Mr. M. M. O'Shaughnessy, City Engineer,
City of San Francisco,
City Hall,
San Francisco, California.

Dear Sir:

I am advised that you have available considerable electric energy at the power plant built for the construction of the Hetch Hetchy project. The Sierra and San Francisco Power Company informs me that it has a line which can [254] transmit part or all of this energy.

In view of the present power shortage and the imperative need of making use of all the power available in order to protect shipbuild-

(Testimony of Paul J. Ost.)

ing and other essential war industries, you should at once make arrangements to turn this power over to the Sierra and San Francisco Power Company so that it will be available for general use.

This letter should be construed as a formal order to that effect.

Yours truly,

(Signed) H. G. BUTLER

HGB:FMc Power Administrator."

The witness continuing:

The Early Intake plant is approximately twenty miles from Priest. There was a technical advantage from an engineering point of view, in having the power from the Early Intake delivered at Priest into the lines of the Sierra and San Francisco Power Company. The latter lines serve a number of communities and mines, and between its closest generating plant and Priest the line was a very light one and the service was very poor, and by procuring this connection it gave good service to the consumers taking power off of that extension.

Conversely, we had trouble in maintaining the Early Intake plant in continuous operation. This was due to two or three reasons. First,

(Testimony of Paul J. Ost.)

there were times when there was a failure of water due to the dryness of the season; there were one or two cases where unavoidable accidents occurred which cut off the delivery of water to the power house, and, therefore, this connection served as a standby to permit the continuation of construction while the plant was out of order.

As the construction work tapered off on the Mountain Division of the Hetch Hetchy project, our surplus power at the Early Intake plant in a larger quantity continued to be delivered to the Sierra and San Francisco system. Later, the delivery from the Early Intake was diverted from the Moccasin Power Plant into the transmission lines which extended from Moccasin to San Francisco, and a direct connection was made between the Early Intake and the Sierra system, later taken over by the Pacific Gas and Electric Company.

We are still using the Early Intake plant for construction purposes.

I recognize the three statements shown me marked May 31, 1937, June 30, 1937 and July 31, 1937, respectively. They are the forms of bill made out against Pacific Gas and Electric Company for the electric energy of the Hetch Hetchy project, delivered to the Company at Newark. These [255] bills are sent out by the City monthly.

(Testimony of Paul J. Ost.)

Counsel for the defendant thereupon offered in evidence the three bills mentioned and identified by the witness, and in connection with the offer stated that it was made merely for the purpose of showing the form of the bills and that the amount of none of the bills was significant. Said bills were thereupon received in evidence, and collectively marked

"DEFENDANT'S EXHIBIT N".

In the order of their dates, they read, respectively, as follows:

Pacific Gas and Electric Co.
San Francisco, California
to Electric Power Bureau, Dr.
Public Utilities Commission
425 Mason Street, Room 610
Telephone PRospect 7000
San Francisco, California.

	Memo Only		
June 1937—Delivered at Newark		40,066,600 KWH	
Losses 24%		9,615,744 "	
			30,449,856 KWH
Revenue at $0,02383	725,620.07		
Company's Compensation 73.065%	530,174.30		
		$195,445.77	

Received Payment
July 9, 1937.

Dr. Acct. 3200	$195,445.77	5001	$530,174.30	
Cr. Acct. 5000	718,008.97	5200	7,611.10	
Apprn: Delivery intake to Moccasin	1,660.000 KWH	At	$0,004585	$7,611.10

[256]

San Francisco, July 31, 1937
No. 7-22

Pacific Gas and Electric Co.
San Francisco, California
to Electric Power Bureau, Dr.
Public Utilities Commission
425 Mason Street, Room 610
Telephone PRospect 7000
San Francisco, California.

	Memo Only		
July 1937—Delivered at Newark		40,754,400 KWH	
Losses 24%		9,781,056 "	
			30,973,344 KWH
Revenue at $0.02383		$738,094.79	
Company's Compensation 73.065%		539,288.96	
			$198,805.83

Received Payment
August 11, 1937

Dr. Acct. 3200	$198,805.83	5001	$539,288.96	
Cr. Acct. 5000	733,172.79	5200	4,922.00	
Apprn: Delivery Intake to Moccasin 1,073,500 KWH at			$0.004585	$4,922.00

San Francisco, May 31, 1937
No. 5-21

Pacific Gas and Electric Co.
San Francisco, California
to Electric Power Bureau, Dr.
Public Utilities Commission
425 Mason Street, Room 610
Telephone PRospect 7000
San Francisco, California.

	Memo Only		
May 1937—Delivered at Newark	36,729,600 KWH		
Losses 24%	8,815,104 "		
		27,914,496 KWH	
Revenue at $0.02383	$665,202.44		
Company's Compensation 73.065%	486,030.16		
		$179,172.28	

Received Payment
June 9, 1937.

Dr. Acct. 3200	$179,172.28	5001	$486,030.16
Cr. Acct. 5000	657,655.53	5200	7,546.91

Apprn: Delivery Intake to Moccasin 1,646,000 KWH at $0.004585 $7,546.91"

[257]

(Testimony of Paul J. Ost.)

In connection with said three bills, counsel for the defendant made the following statement:

Mr. Searls: I would like the record to show that these bills are on the stationery of the Electric Power Bureau of the Public Utilities Commission, and they show the month, the year, the number of kilowatt hours delivered at Newark, the line loss of 24 per cent. under the contract is shown between Newark and San Francisco, the resultant number of kilowatt hours reaching San Francisco and revenue at the contract formula 0.2383, and subtracting from that revenue, the company's compensation, 73.065 pursuant to the contract, and the balance paid over to the city monthly.

Q. At the bottom is the note "Delivery Intake to Moccasin", a certain number of kilowatt hours at 0.004585, which represents the delivery of the Intake plant to Moccasin Creek, does it not?

A. Correct. The figure 0.004584 is the statement of the percentage of the net revenue applicable to the energy supplied from the Early Intake. The total revenue derived by the City from delivery of electric energy under the provisions of the contract of July 1, 1925, is approximately $2,200,000 a year.

Thereupon the following occurred:

Mr. Searls: Q. How does the Hetch Hetchy load as delivered under this contract, compare with the total demand in San Francisco?

(Testimony of Paul J. Ost.)

Mr. Hennessy: Objected to upon the ground that it is immaterial, irrelevant, and incompetent.

The Court: For the purpose of the record, what is the purpose of the offer?

Mr. Searls: I wish to show first that the amount of energy which is delivered under this contract is less than the demand in San Francisco, and that if this contract were terminated there would be insufficient energy available for the service of consumers in San Francisco, unless and until the Pacific Gas & Electric Company or some other distributing company should construct new hydro-electric plants and steam plants and standby service. I think that is a very important point from our standpoint to show a public interest in the matter which a court of equity is always entitled to consider in determining whether or not equitable relief will be afforded.

Mr. Hennessy: It is offered on the theory of impossibility of performance of this contract by the city and is covered by your Honor's previous ruling.

Mr. Searls: No, it is not offered on the theory of impossibility of performance but it is offered on the theory that the Court should not award injunctive relief where a great detriment will result to a large number of the public [258] unless no other remedy is available.

(Testimony of Paul J. Ost.)

Mr. Hennessy: That is covered by the ruling your Honor made a few moments ago.

Mr. Searls: I do not think it is. If it is, I would like to have a ruling.

The Court: The objection will be sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 18.

Thereupon counsel for the defendant made a formal offer of proof as follows:

> I formally offer to prove, through this witness, that if the amount of energy generated and delivered into San Francisco through the medium of this contract, whether it be the identical kilowatts or an equivalent amount, if due to a termination of the contract, were subtracted from the total delivery to San Francisco, it would cause such a shortage in the available power supply of the Northern part of the State of California as would require the construction of additional power plants or additional facilities for bringing power, and would thus endanger the supply for public consumption.

Counsel for the plaintiff objected to the offer of proof so made upon the ground that the matters therein stated were incompetent, irrelevant and immaterial and hypothetical and based upon facts not

(Testimony of Paul J. Ost.)

in evidence in the case. The Court sustained said objection.

Counsel for the defendant duly excepted to the ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 19.

Thereupon the following occurred:

Q. Mr. Ost, has the Moccasin power plant been operated in such a way as to indicate that its performance is responsive to the power demands of San Francisco and consumers?

A. Yes.

Mr. Hennessy: I object to that as immaterial, irrelevant and incompetent. [259]

Mr. Searls: The purpose of this question is to show that the operation of the city's plant is in the nature of a demand by the city to serve its own consumers in San Francisco through the medium of this contract, and not with reference to the needs of the Pacific Gas & Electric Company which the Government apparently is claiming is one of the elements of sale rather than agency.

The Court: I will allow the question to be answered.

A. Yes, the regular operation of the Hetch Hetchy plant indicates that the output of the plant is governed to meet the demands of consumers in San Francisco.

(Testimony of Paul J. Ost.)

(The witness continuing):

The rate of that delivery is controlled by the load factor on the system of the Pacific Gas and Electric Company. The City power enters that system in such a manner as to cause it or an equivalent quantity to flow naturally to San Francisco consumers rather than to any other consumers of the company. This fact is shown by the following:

The hydroelectric plants in California generating power, are, I think, in every instance, in the mountains at some considerable distance from the coast, where the larger cities are, and where the power is consumed. This necessitates the construction of high voltage transmission lines across the State of California. These lines vary in length from 100 to over 250 miles. Naturally, the shorter the line the more reliable it is. The location of San Francisco at the tip of the peninsula makes it difficult to bring hydroelectric power into San Francisco from the company's own plants. The Hetch Hetchy plant is almost directly due east of San Francisco. The transmission line from the Hetch Hetchy plant comes to the lower end of San Francisco Bay in a direct line, where it contacts the far end of this long transmission line of the company. From Newark substation to San Francisco there are six transmission lines. The Hetch Hetchy power comes into those lines at

(Testimony of Paul J. Ost.)

a point where the operating conditions are not conducive to reliability of service or to best operating conditions. With the company's lines they form a very direct and a very reliable circuit from the nearest large generating plant in the State of California, and therefore, with the company having a very large percentage of its load in San Francisco, there is no reason to believe but what the Hetch Hetchy energy finds its most direct outlet into San Francisco rather than back into the company's system through some other transmission line which terminates at Newark.

Q. Does the company take all of the city's power up to the 75 per cent. load factor specified in the contract?

A. It does.

Q. That is, as specified in the contract, a monthly average? [260]

A. I do not think it is specified as a monthly average. It is only specified in the contract that they will take the power on a 75 per cent. load factor and between the operating officials and the company it has been determined that that should be based on a monthly basis; that is, in month terms, rather than daily terms or yearly terms.

Q. What does that mean so far as the actual delivery from the plant is concerned? Do they fluctuate on a larger load factor than that and then on a smaller load factor?

(Testimony of Paul J. Ost.)

A. It means this; that on a Sunday or on a holiday when the load in San Francisco is light, your load factor up at the mountain plant is considerably below 75 per cent., but on the succeeding two days, and days when the demand for power is available the plant delivers up to capacity, so that by the end of each month the energy delivered into the company's system from the Moccasin plant equals 75 per cent. load factor.

(The witness continuing):

At one time in conjunction with the City Engineer I prepared estimates of what it would cost the City to build a distribution, transmission and stand-by system.

Q. What was your estimate of the cost of the city's constructing a transmission, stand-by and distribution system adequate to supply the Hetch Hetchy energy to its people and to furnish the necessary stand-by and supplemental system?

Mr. Hennessy: Objected to on the ground it is immaterial, irrelevant, and incompetent, and the only point in the case is that they have not fulfilled.

The Court: That is not a preliminary question.

Mr. Searls: No.

The Court: The objection will have to be sustained.

(Testimony of Paul J. Ost.)

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 20.

In connection with said ruling, counsel for the defendant thereupon made the following formal offer of proof:

> I offer to prove that it would cost in excess of $60,000,000.00 for the City to build and install its own transmission, step-down, distribution and stand-by service.

Counsel for the plaintiff objected to said offer upon the ground [261] that it called for matters that were incompetent, irrelevant and immaterial, and not within the issues of the case. The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 21.

> Q. What would be the cost of a necessary stand-by system plant for San Francisco if the City were to transmit and distribute only the energy produced at the Moccasin plant without reference to any steam supplemental plant?
>
> Mr. Hennessy: Objected to upon the ground it is immaterial, irrelevant and incompetent, and not within the issues of this case.
>
> The Court: The objection will be sustained.

Counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 22.

(Testimony of Paul J. Ost.)

(The Witness continuing):

I first came to the Engineering Department of the City and County of San Francisco in the Spring of 1909. I was familiar with the plans for the utilization of the Hetch Hetchy power which were in effect prior to the enactment of the Raker Act. I was familiar with the plans which were in effect at the time the Raker Act was enacted.

Q. At what period of time was it definitely determined to pierce the Coast Range Mountains by tunnel and bring the water into the City and County of San Francisco by gravity instead of pumping it over the Coast Range?

Mr. Hennessy: I object to that as immaterial, irrelevant, and incompetent, and not within the issues in this case.

Mr. Searls: The testimony is offered, if your Honor please, for the purpose of showing the change in conditions from the time the grant was originally passed, at which time I intend to show by this witness the plan had been to pump the water over the Coast Range and to use the power for that purpose. Although Engineer Freeman made a study of the Coast Range tunnel prior to the enactment of the Raker Act, it was not actually decided upon until later when they made various core bearings and shafts to prove that it was possible

(Testimony of Paul J. Ost.)

to penetrate that particular formation with tunnels. [262]

The Court: And that was prior to 1925, was it?

Mr. Searls: That was long prior to 1925, but it was subsequent to the enactment of the Raker Act. We want to show that the surplus power available to San Francisco was enormously greater than it was thought at the time the Act was passed.

Mr. Hennessy: It is the same question, your Honor; it simply goes to the same question of convenience, that it was more convenient for San Francisco to change its plan and to sell the power than to conform to the Act. It comes directly within your Honor's previous rulings.

Mr. Searls: It might have had considerable to do with what the intention of Congress was in passing the Act in the first place. Under the authority of these cases I cited from the Supreme Court of California, and from all over the country, testimony showing changes in conditions surrounding the utilization of a grant respecting restrictive covenants is admissible.

The Court: The objection will have to be sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 23.

(Testimony of Paul J. Ost.)

Counsel for the defendant thereupon made a formal offer of proof as follows:

I offer to prove by this witness that at the time the Hetch Hetchy grant was enacted, and for many years prior thereto, it had been the plan of the Engineering Department of the City and County of San Francisco to pump Hetch Hetchy water over the Coast Range Mountains and to utilize the greater part of the power which might be developed on that project in so doing. That subsequently to that date—subsequently to the enactment of the Raker Act, some three years afterwards, and not until then, was it determined through the drilling of core holes and the sinking of shafts that it would be physically possible to tunnel that range, the geological conditions being very difficult, and that when that determination was made and the range was tunneled so that the water could come in by gravity from the Moccasin Creek levels, it represented an enormously greater amount of electricity available for disposal by the City than was contemplated at the time the Raker Act was enacted.

The Court: What relation has that state of facts to the issues in this case?

Mr. Searls: First it shows the state of facts which were submitted to Congress at the time of the Raker Act, and will assist the Court in interpreting the language of [263] Section 6 as

(Testimony of Paul J. Ost.)

to the intention of Congress in enacting that language, and, secondly, it shows the change of circumstances which we think should affect the remedy which the Court might impose under the terms of this agreement.

Mr. Hennessy: We object to the offer upon the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case. The fact that the City of San Francisco changed its plans after the adoption by Congress of the Raker Act is not material at all on the question of whether or not San Francisco, in the sale of power, is violating Section 6 of the Raker Act.

The Court: In what way is that binding on the Government?

Mr. Searls: I do not think it would bind the Government, at all, except that I think it would indicate the intent of Congress if they were dealing with a given state of facts, an estimated quantity of power, and then those facts were changed afterward—it might affect the construction of that Act as well as the remedy. It is offered for both purposes.

Mr. Hennessy: The only way they could do, if they changed the plan, would be they would have to go back to Congress and ask them to change the Act. If this evidence here is offered as an excuse why they are not complying with Section 6 of the Act, why they are selling the

(Testimony of Paul J. Ost.)

power to the Pacific Gas & Electric Company, it is not material.

The Court: The objection will be sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 24.

Cross-Examination.

Pacific Gas and Electric Company first leased the property of the Sierra and San Francisco Power Company and at a later date acquired it. I am not certain when it first leased the property, but it was possibly in the neighborhood of 1922 or 1923. I do not know. I could not state definitely when it acquired the property, but it was a number of years later.

It was some time late in 1935 that the power developed at the Early Intake plant was first diverted so that it came into the Moccasin Power Plant transmission system. Since that time the power developed at the Early Intake plant has passed into the Pacific Gas and Electric Company trans- [264] mission system at Newark. None of that power is ear-marked when it comes into the Pacific Gas and Electric Company system. The system of the Company supplies San Francisco and the Peninsula and practically all of northern California but its particular substation at Newark does not

(Testimony of Paul J. Ost.)

supply anything but the Peninsula and San Francisco.

It is impossible to state definitely whether the power which the Pacific Gas & Electric Company receives from the Moccasin Power Plant and the Early Intake Power Plant goes to the peninsula cities or goes to San Francisco, but the major part by far of the power which comes into Newark comes into San Francisco. The diversion from Newark, other than to San Francisco, is a very small percentage of the energy which comes into the Newark station. I would say that possibly five to seven per cent of the total energy delivered into Newark is distributed to places other than San Francisco. The amount of energy which comes into that station from other generating plants of the Pacific Gas and Electric Company is considerably larger than the percentage that is distributed in places other than in San Francisco. The Pacific Gas and Electric Company has a number of plants which may be connected with the substation at Newark. It has energy from its Tiger Creek Plant and energy from its plant at Mt. Shasta. The latter connection, however, has only been established in the last few years. It, also, has power plants at Electra and other small plants in the mountains north of the Hetch Hetchy project.

(Testimony of Paul J. Ost.)

Redirect Examination.

Q. Mr. Ost, Mr. Hennessy asked you about the plants from which this energy came. Does some of this energy of the Pacific Gas & Electric Company come from the plants owned by the United States in the Yosemite National Park, do you know?

A. I do not think so, Mr. Searls; because the energy which is sold by the United States Government is sold to the San Joaquin Light & Power Company, which is, now, a subdivision of the Pacific Gas & Electric Company.

(Witness continuing):

The latter energy goes into the San Joaquin territory adjacent to Fresno. The power generated at the Don Pedro Power Plant of the Modesto and Turlock Irrigation Districts by the water released from the Moccasin Plant, also, goes into this system of the Pacific Gas & Electric Company. The water, after it is released from the Modesto Power House, goes into the Don Pedro Reservoir of the Turlock and Modesto Irrigation Districts. They have a generating plant at the Don Pedro plant and the excess power is sold to the San Joaquin Light & Power Company, the same as the Government sells power generated at the Yosemite Plant, to San Joaquin Light & Power Company. [265]

N. RANDALL ELLIS,

a witness for the defendant, being first duly sworn, testified as follows:

I am the Chief valuation and rate engineer for San Francisco, attached to the City Attorney's office. I have held that position since 1913.

At this point, counsel for the plaintiff stipulated that Mr. Ellis had the requisite qualifications as an engineer to testify as an expert.

(The witness continuing):

In the early part of 1925, I was requested by the City officials of San Francisco to make an analysis of the figures on the basis of which the return of .0238 cents in the contract between the City and the Pacific Gas & Electric Company ("U. S. Exhibit No. 6") is based. At the time I prepared a memorandum for the Mayor's Advisory Committee. As shown by said meorandum, the gross revenue for the sales of electric energy made by Pacific Gas & Electric Company in San Francisco during the year 1924, was $8,853,545.00; that was for the combined Pacific Gas & Electric and Sierra and San Francisco Power plant and excluded inter-department sales. The corresponding amount of electric energy sold, excluding inter-department sales, was 371,556,777 kilowatt hours. Inter-department sales are largely sales from

(Testimony of N. Randall Ellis.)

the electrical department of the Company to the Gas Department of the Company, and some small sales to the steam department. In other words, for the purpose of accounting there were certain transfers of the energy from the electric station to the adjacent gas station for the purpose of running meters, etc. It was an inter-company affair which I have excluded, as it would be sold ordinarily at a lower rate than the rate in the schedule.

The combined average per kilowatt hour, therefore, was $8,853,545.00 divided by 371,556,777 which gave an average of .02383 cents per kilowatt hour.

The factor of seventy-six per cent efficiency used in the contract as applied to the average delivery at Newark was obtained in this way: The resultant sales at consumers' meters in terms of energy and estimated transmission and substation efficiency from Newark to the 11 K. W. P. station at Martin substation was estimated at 92.75 per cent. The Martin substation is in the neighborhood of Visitacion Valley just below the County line of San Francisco. It is a large substation stepping down the energy from 110,000 volts A.C. to 11,000 volts A.C.

The estimated distribution efficiency as based upon the experience of the Pacific Gas & Electric Company in San Francisco, from substa-

(Testimony of N. Randall Ellis.)

tion output to its meter was [266] 82 per cent. Therefore, the resultant efficiency between delivery at Newark and consumers' meters was 92.75 multiplied by 82 which gives a resultant of 76 combined efficiency between Newark and the consumers' meters.

The first figure of 92.75% was based on an estimated transmission loss between Newark and the Martin substation plus about 2½ per cent loss in transforming the 110,000 volts to 11,000 volts at the Martin substation. The estimated distribution efficiency between the Martin substation and the consumers' meter was determined in this way: I had all of the data of the operating conditions of the Pacific Gas & Electric Company, with which I had to keep in close touch, on account of handling the rate making. I took the substation output in San Francisco and took also the sales at meters. The resultant showed, at that time, about an 18 per cent loss, which was a combination of loss in the 11,000 volt circuit lines in transformation at the secondary subdivision from 11,000 volts to 2400 volts, the loss between the substation and the pole transformers by which the current is converted from 2400 volts to 110 volts for use in the houses, such losses as might occur in meters, and another loss which was characteristic of a portion of the load at that time, that is the loss resulting from the con-

(Testimony of N. Randall Ellis.)

version of alternating current to direct current for use in industries. The other 18 per cent. was a combination of all intermediate losses between the A.C. terminal at Martin substation and the consumers' meters.

Q. In other words, in your opinion does this 24 per cent. represent the approximate actual loss which a given quantity of energy would suffer if put into the company's system at Newark before it reached the consumers' meters at San Francisco?

A. It did at that time.

Mr. Searls: Q. Now, will you continue with your explanation of the balance of the figures, of the 73 per cent.?

A. I can probably explain it better by reading a short report that I made to the Mayor's Committee at that time, to James Rolph, Jr., Ralph McLeran, and Warren Shannon, who were a committee of the Board of Supervisors on Hetch Hetchy Power.

"Gentlemen:

In compliance with your request, I would respectfully submit the following estimate of probable costs to the Pacific Gas and Electric Company, to deliver Hetch Hetchy power from Newark to consumers' meters.

I have expressed this in percentages of gross revenue received from consumers, taking gross revenue as 100%."

(Testimony of N. Randall Ellis.)

I am reading a copy of a report that I made. I am just coming to the figures you requested. [267]

Q. In your opinion is that correct?

A. That report was correct at that time, in my judgment.

The Court: Proceed.

A. "A. General Administration Expense — General Capital charges, Taxes, Fire, Casualty and Uncollectible Reserves 17.5%

B. Distribution Costs from high tension side of Martin Substation to consumers' meters, including return on capital, depreciation, operating and maintenance expense 35.3%

C. Steam Standby and Peak Load Expense, including return on capital, depreciation, operating and maintenance expense 18.0%

D. Transmission Expense, Newark to Martin substation 2.5%

73.3%"

Q. In your opinion at that time did that figure represent the actual expense of the Pacific Gas & Electric Company in distributing

(Testimony of N. Randall Ellis.)

electrical energy received by it at Newark to consumers in San Francisco, including a reasonable return on the capital required for that purpose?

A. Yes.

Mr. Hennessy: We object to that on the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case.

The Court: The Court's opinion is that what he read does not enter into the merits of this case. However, I departed so that I might be informed as to the figures. The objection is sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated as Ruling and Exception No. 25.

Thereupon the following occurred:

Mr. Holm: I assume the Court will take judicial notice of the opinions of the California Railroad Commission. I wish to call your Honor's attention to Decision 21,247, "In the Matter of the Application of the City and County of San Francisco, a Municipal Corporation, that the Railroad Commission of the State of California fix and determine the just compensation to be paid by the City and County of San Francisco".

Mr. Hennessy: The Court does not take judicial notice of the Railroad Commission's decisions.

(Testimony of N. Randall Ellis.)

Mr. Holm: If it does not we will ask that it do [268] take judicial notice of the decision that I have referred to, in response to Application No. 9767, that the Railroad Commission of the State of California fix and determine the just compensation to be paid by the City and County of San Francisco for certain parts and portions of the electric generating, transmission and distribution properties of the Great Western Power Company of California, a corporation. I ask that that decision, without burdening the record at this time in reading it, be accepted as evidence. The purpose of the offer is this, that in the rate proceedings of the Great Western Power Company which were instituted on February 11, 1924, the value of these properties was fixed by the Commission in the sum of $11,815,000. Now, we have submitted and made an offer that in the year 1930 a bond issue was submitted to the people of San Francisco to purchase the Great Western Power Company in the amount of $18,945,000. There is an apparent discrepancy between the $11,815,000, as fixed by the Railroad Commission, and the amount of the proposed bond issue, and through this witness I wish to establish wherein the discrepancy arose.

Mr. Hennessy: I do not think the evidence is admissible under any theory. We are not concerned here with any discrepancy as was

(Testimony of N. Randall Ellis.)

stated by counsel. It is absolutely immaterial, irrelevant, and incompetent and not within the issues of this case.

Mr. Holm: If your Honor please, we think it is competent, relevant, and quite material to the issues in this case. We wish to establish to this court of equity and have firmly fixed in the record of this case that the City and County of San Francisco officially did everything within its power to fulfill the terms of the Raker Act, and specifically the provision that was called to your Honor's attention in this case.

The Court: Is the matter submitted?

Mr. Holm: Yes.

The Court: The objection will be sustained.

Counsel for the defendant duly excepted to said ruling of the Court. Said ruling and exception are here designated Ruling and Exception No. 26.

Counsel for the defendant thereupon made a formal offer of proof respecting the subject matter of the foregoing ruling as follows:

Mr. Holm: I offer Decision No. 21,248 of the Railroad Commission In the Matter of the Application of the City and County of San Francisco, a Municipal Corporation, that the Railroad Commission of the State of California fix and determine the just compensation to be paid by the City and County of San Fran-

(Testimony of N. Randall Ellis.)

cisco for certain parts and portions of the electric generating, trans- [269] mission and distribution properties of the Pacific Gas and Electric Company, a corporation; said decision and the one previously referred to are found in Volume 33 of Opinions and Orders of the Railroad Commission of California. The last decision referred to fixes the valuation of the properties of the Pacific Gas & Electric Company as of June 1929 in the sum of $26,880.00. The exhibit that we have heretofore offered shows that on August 26, 1930, a bond issue was submitted to the people of the City and County of San Francisco for the purpose of acquiring certain properties of the Pacific Gas & Electric Company in the amount of $44,600,000, and we desire to show to the Court wherein the difference in the valuation fixed by the Railroad Commission of the property of the Pacific Gas & Electric Company sought to be taken in this proceeding and the bond issue in the amount that I have specified—we want to show wherein that difference arose.

Counsel for the defendant objected to said offer upon the ground that it was immaterial, irrelevant, and incompetent, and not within the issues of this case, and in connection therewith stated that the Court had previously ruled that the evidence with reference to the bond issues was not admissible. The Court sustained said objection.

(Testimony of N. Randall Ellis.)

Counsel for the defendant objected to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 27.

As hereinbefore stated, said Decisions 21247 and 21248, rendered by the Railroad Commission of California, pursuant to the aforesaid Applications, respectively, are reported in Volume 33 of Opinions and Orders of the Railroad Commission of California, at pages 202 and 219, respectively.

Thereupon the following occurred:

Mr. Searls: Your Honor, I won't take the time of the Court in calling a witness on this, but I desire to offer in evidence through Mr. William Nanry, who was called as a witness yesterday, a statement of the bonds which have been authorized and sold by the City and County of San Francisco for governmental purposes between 1924-5 and 1937, for the purpose of showing the changes in the city's bonding capacity which have resulted thereby and the legal impossibility of the city voting bonds sufficient to cover the cost of a municipally-owned distribution system. [270]

In connection with said offer counsel for the plaintiff stipulated that the witness, if called, would testify that the figures stated in the statement were correct, but objected to the offer of the statement as follows:

Mr. Hennessy: We object to it on the ground it is immaterial, irrelevant, and incom

(Testimony of N. Randall Ellis.)

petent, and, as stated by counsel this morning, the financial inability of San Francisco to comply with the provisions of the Raker Act is no justification for the sale of power contrary to the terms of Section 6 of the Raker Act.

Mr. Searls: My thought of this is not financial, but with respect to the law.

The Court sustained said objection. Counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 28.

Said statement was thereupon marked for identification as

"DEFENDANT'S EXHIBIT NO. O for Identification"; it reads as follows:

"(October 1937)

Table A.

(a)	Assessment Roll	Debt Limitation	Bonded Debt Subject to Limitation	Leeway for New Debt	Non-Limit Debt, Charge on Taxpayers
1924-25	$684,099,920	102,614,988	89,823,400	12,791,588	
1927	Bonds Authorized	Memorial Hall	(6-14)	4,000,000	
		*Bernal Cut	"	1,400,000	
		*Boulevard	(11-8)	9,380,000	
1928		*Hetch Hetchy	(5-1-28)		24,000,000
1929		*Hospital	(11-6-28)	3,500,000	
		*Sewer	(11-6-28)	2,200,000	
		sub-total		20,480,000	24,000,000

(Testimony of N. Randall Ellis.)

	Assessment Roll	Debt Limitation	Bonded Debt Subject to Limitation	Leeway for New Debt	Non-Limit Debt, Charge on Taxpayer
(b)					
1929-30	1,196,439,062	143,572,687	53,009,400	90,563,287	
1931	Bonds Authorized		sub-total above	20,480,000	24,000,000
			County Jail (11-4-30)	850,000	
			*Unemployment, Park Playground, Streets	2,500,000	
1932			Relief (8-30-32)	6,500,000	
			Hetch Hetchy (5-3-32)		6,500,000
1933			*Sewers (11-7-33)	2,625,000	
			*High Pressure	2,000,000	
			*Airport	260,000	
			*School (12-19-33)	3,000,000	
				38,215,000	30,500,000

[271]

(c)					
1937-38	991,119,933	118,934,392	48,706,600	70,227,792	
1937	Bond Issue Propositions on Nov. 2, 1937 ballot		Cahill-Ridgway. Street Car Rapid Transit Subway Plan	49,250,000	
			Sewer Improvement	5,000,000	
			Airport Development	2,850,000	
			Health Department Building Improvements	1,600,000	
				58,700,000	

*Details of these bond issues outlined in Table B''

Thereupon the following occurred:

Mr. Searls: I also offer to prove by said witness that during the period from 1929 to 1937 particularly, due to the advent of the recent depression, the burden cast upon the bonded leeway of San Francisco through the operation of the bond debt limitation law has been greatly increased, and the leeway diminished because of the necessity of providing a large sum of money for relief and large sums of money for sewers, schools, streets, and other expenditures which in normal times would be taken care of through the annual tax levy, but by reason of this severe depression having been forced to be capitalized in order to make possible the rendition of this service to the people of San Francisco.

Counsel for the plaintiff objected to said offer upon the grounds that the matters embraced therein were incompetent, irrelevant and immaterial and not within the issues of the case. The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 29.

Mr. O'Toole: At this time, if your Honor please, we desire to offer a certified copy of the Water Appropriations made by San Francisco and by other persons on behalf of San Francisco, and by others whose rights are as-

(Testimony of N. Randall Ellis.)

signed to San Francisco, showing the various water rights which San Francisco has acquired on the Tuolumne River, Lake Eleanor, Cherry River, and tributaries of both rivers and the lake, for the purpose of showing that the water rights which [272] are used in the development of the power which is the subject of this action are owned by the City of San Francisco under and by virtue of the laws of the State of California and pursuant to no grant from the federal government. I understand that the United States Attorney, while he objects to the materiality of the evidence, will not object to the form in which it is presented, your Honor.

Mr. Henriessy: That is true. But we object to the evidence upon the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case. We are not concerned with who owns the water.

The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 30.

Counsel for the defendant then made a formal offer of proof as follows:

Mr. O'Toole: I now offer a record of the water rights of the City and County of San Francisco on the Hetch Hetchy project, showing that water owned by virtue of the city's

(Testimony of N. Randall Ellis.)

rights is used for the development of the Hetch Hetchy electric power which is being distributed by the Pacific Gas & Electric Company under and pursuant to the provisions of the contract which is the subject-matter of the action, and offer to prove that the city is the owner of those rights, and, as I said, they constitute the rights whereby the City of San Francisco makes use of the water on the Hetch Hetchy project.

Counsel for the plaintiff objected to said offer on the grounds that the matters embraced therein were immaterial, irrelevant and incompetent, and not within the issues of the case, and that the ownership or non-ownership of these water rights by the City of San Francisco was not involved in any way in the case.

The Court sustained said objection, and counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 31.

Thereupon, said record of water appropriations was marked "Defendant's Exhibit P for Identification".

The record of the water appropriations contained in said "Defendant's Exhibit P for Identification" shows 56 separate appropriations of water [273] rights and appurtenant easements made by James D. Phelan, William Ham Hall, Marsden Manson, Sierra Ditch & Water Company, Thomas R. Hanna,

(Testimony of N. Randall Ellis.)

and the City and County of San Francisco in respect of the waters and bed of Eleanor Creek, Tuolumne River, Cherry River, Frog Creek and other streams in Tuolumne County, California, and elsewhere, in the State of California. The first of said appropriations was made on July 29, 1901, and the last of them was made on August 15, 1911. Said record of appropriations, exclusive of the index page preceding the same and the certificate page following the same, comprises 109 pages. Because of its character and size it is impracticable to incorporate said original Exhibit herein, but it will be transmitted to the United States Circuit Court of Appeals as part of the defendant's record on appeal herein for use upon said appeal.

Thereupon the following occurred:

Mr. O'Toole: At this time I also offer, if your Honor please, a record of the assignments made by the various appropriators of the water rights which are mentioned in "Defendant's Exhibit P", said assignments running from said appropriators to the City of San Francisco.

Mr. Hennessy: We make the same objection to that as immaterial, irrelevant, and incompetent, and not within the issues of this case.

The Court: The same ruling.

Counsel for the defendant duly excepted to said ruling. Said ruling and exception are here designated as Ruling and Exception No. 32.

(Testimony of N. Randall Ellis.)

The record of the assignments of said water rights covered by the said ruling were thereupon marked for identification as "Defendant's Exhibit Q for Identification".

Said record of assignments included within "Defendant's Exhibit Q for Identification", comprises eight separate assignments, (some of them mediate and some of them intermediate), from William Ham Hall, Thomas [274] R. Hanna, Sierra Water & Ditch Company, Tuolumne Water Supply Company, James D. Phelan and Marsden Manson to the City and County of San Francisco, of the appropriation rights of the assignors in respect of water and appurtenant rights on streams in Tuolumne County, California, and elsewhere in the State of California, as well as certain appropriations of water rights and appurtenant rights. Said record, exclusive of the index page, comprises forty-four pages, and, because of its character and size, it is impracticable to incorporate it herein. Said original exhibit, however, will be transmitted to the United States Circuit Court of Appeals as part of the defendant's record on appeal herein for use upon said appeal.

In connection with the offers of the documents, marked for identification as "Defendants Exhibit O to Q", inclusive, as aforesaid, the following occurred:

Mr. Searls: Mr. Hennessy, I do not want the question of technical procedure to arise

(Testimony of N. Randall Ellis.)

here as to the offers, that we did not actually have a witness on the stand at the time I made my previous offers and Mr. O'Toole made his. Will there be any point made by the Government on that?

Mr. Hennessy: No, we make no point on that.

Thereupon the following occurred:

Mr. O'Toole: The defendant rests.

Mr. Hennessy: The Government rests.

Mr. Licking: If your Honor please, at this stage of the proceedings I wish to address a motion to strike certain of the evidence beginning with the evidence of the witness Joseph J. Phillips, given on October 20, and more particularly that part of the evidence of the witness Philips where he testified to the value of certain lands given by the Government under the terms of this Act to the defendant, and where he also testified as to the value of certain lands returned by the defendant to the Government. I submit it upon the objections previously stated.

The Court: Is it the subject of a motion to strike.

Mr. Licking: Yes. [275]

Mr. O'Toole: As the motion which counsel is making, that is, his motion to strike, goes to

the very merits of this case, I respectfully ask your Honor that when the Government has made its motion to strike your Honor reserve the ruling until at least the matter has been argued and briefs are in.

The Court: There is no objection to that, I take it?

Mr. Hennessy: No.

Mr. Licking: There is no objection to that except the points have been argued and are before the court now.

The Court: I know, but if they wish to argue them further I am willing to give them the time. Let the record remain and you can renew your motion at the proper time.

Mr. Licking: I am making it at this time merely referring to the names of the particular witnesses and generally indicating the evidence, and in the memorandum submitted to the Court the evidence will be singled out and definitely specified. I might say at this time that I will simply make a general designation of the testimony as given by the witness, and will specifically designate it in the memorandum given to the Court.

Mr. O'Toole: That is entirely all right.

Mr. Licking: All of the evidence given by the witness Joseph J. Phillips as to comparative costs and values.

The same motion will be directed to the testimony of the witness Hansen given when re-

called to the stand on October 20, with respect to the cost of certain road work, certain trails, certain expenses for grading and construction, certain expenses on roadways, certain expenses for annual payments, and all of the evidence that was given by this witness as to comparative costs and values, and all his estimates concerning engineering costs along that line.

At the same time we will move that there be stricken from the records of the court a certain letter from the Secretary of the Interior to the City dated May 18, 1928, which is Defendant's Exhibit C.

We also move that the testimony of the witness W. H. Nanry, as to certain estimates made by this witness, as to an assumed increase in tax rates payable by the voters of the voters of the City and County of San Francisco, and all of the testimony by said witness as to the comparative cost estimates and estimated increase in tax rates, be stricken from the record upon the grounds previously stated, that the same is immaterial, irrelevant, and incompetent, and that it is not within the issues of this case.

We address the same motion to the testimony of the witness Ellis, the Chief Engineer of San Francisco, and particularly to that portion of his evidence wherein he testified [276] as to certain figures stated in the contract as the basis of the rate of compensation paid to

the city and his testimony as to the method or methods whereby these figures were arrived at, that it be stricken from the record on the ground that the same is immaterial, irrelevant, and incompetent, and concerns no issue in the case.

Also in connection with the testimony of the witness Willis O'Brien, there was admitted in evidence a certain document dated July 1, 1925, (Defendant's Exhibit F in evidence), which purports to relate to an estimate of bond issues, bonded indebtedness and other matters concerning tax rates, etc., on the ground it is immaterial, irrelevant and incompetent, and concerns no issue in this case.

With reference to the motion in connection with the testimony of R. B. Hansen, I move also to strike the testimony given by him as to the rental value. All of these matters are based on the ground that all of the evidence referred to, and each of the exhibits referred to, and each and every part of the evidence referred to and each and all of the exhibits are immaterial, irrelevant, and incompetent, and that none or any of them have any bearing on the real issues in this case.

Mr. Searls: We resist the motion with the understanding, of course, we will reply to the motions at the time we argue the merits of the case. Is that satisfactory to counsel for the Government?

Mr. Hennessy: Yes.

Mr. Searls: Also for the record, Defendant desires to move for a judgment of dismissal. I suggest that the Court reserve a ruling on the motions to strike until he reads the briefs, and decide the motions at the same time as he decides the case.

The foregoing is all of the evidence offered or received and proceedings had upon the hearing of said cause, except as next stated.

Subsequent to the conclusion of said hearing and before the final argument of said cause, counsel for the Government, pursuant to leave asked and granted at said hearing, as aforesaid, formally specified the evidence with respect to which it urged its motion to strike out, and at the same time formally withdrew the motion of the plaintiff, made at said hearing, to strike out portions of the testimony of the witness H. Randall Ellis. The evidence with respect to which said motion to strike was urged was the following: [277]

1. All testimony given by the witness, Joseph James Phillips, as hereinbefore set forth, with respect to the value of lands acquired by the defendant from the United States under the Raker Act;

2. All testimony given by the witness, Joseph James Phillips, as hereinbefore set forth, to prove that no water rights were acquired by the defendant from the United States;

3. All testimony given by the witness, Joseph James Phillips, as hereinbefore set forth, as to the cost to the defendant or the value of the lands and water rights acquired by the defendant from sources other than the United States;

4. All testimony given by the witness, Joseph James Phillips, and the witness, R. B. Hansen, hereinbefore set forth with respect to the value of the lands given to the United States by the defendant;

5. All testimony of the witness, R. B. Hansen, as hereinbefore set forth, with respect to the cost (including overhead cost) to the defendant of roads and trails in Yosemite National Park, and of the sum of money paid by the defendant to the United States for the construction of roads and trails in said park;

6. Defendant's "Exhibit C" (being the letter dated May 18, 1928, from Secretary of the Interior Work dealing with the defendant's obligation under the Raker Act to construct or otherwise provide roads and trails);

7. All testimony given by the witness, R. B. Hansen, as hereinbefore set forth, with respect to rentals paid by the defendant to the United States, as prescribed in the Raker Act;

8. All testimony given by the witness, Willis O'Brien, as hereinbefore set out, with respect to the bond issues authorized and bonds sold by the defendant to finance the Hetch Hetchy project, and

the amount of interest paid or accrued on sa bonds; [278]

9. All testimony given by the witness, Will O'Brien, as hereinbefore set out, with respect t the available bonding capacity of the defendan within its legal debt limit, in 1925.

10. Defendant's "Exhibit F" (being the doc ment entitled "Bonded Debt Limit" and containin statements of the bond issues available, bondi capacities, etc.)

11. All testimony given by the witness, Wi liam H. Nanry, as hereinbefore set forth, with r spect to the increase in the defendant's tax ra which would be necessary if the defendant lost th revenue now received by it under the contract July 1, 1925, between it and Pacific Gas and Ele tric Company.

Thereafter, said motion to strike was argued an submitted for decision. On April 11th, 1938, th Court made an order by which it granted, in ful said motion of the plaintiff to strike out portion of the evidence in the case. The portions of th evidence so stricken out by said Order were th following:

(a) The following testimony of Joseph Jame Phillips, a witness for the defendant:

Q. What was the value of those parce [referring to the parcels of land conveyed b the United States to the defendant pursua to the terms of the Raker Act.]

A. $244,139.45.

Q. Do you know the total acreage and the value [of the lands conveyed by the defendant to the United States]?

A. The acreage was 1698.36 and the value $74,409.00.

Q. As purchasing agent for the project, and acquiring it, did you acquire any water rights from the United States Government?

A. No.

Q. Are you familiar with the so-called Ham Hall purchase made by the City and County of San Francisco?

A. Yes.

Q. How was it made?

A. $1,052,000. [279]

Q. That includes the water rights and the lands, does it, Mr. Phillips?

A. Water rights and lands and development work, buildings, and various other items.

Q. Where is it located, for the information of the Court?

A. Cherry and Lake Eleanor.

Q. Indicate it on Exhibit A for the information of his Honor.

A. There are three watersheds involved in the Hetch Hetchy project. One is named Hetch Hetchy Valley, and the other two in the watershed are Lake Eleanor and the watershed of Cherry River. Ham Hall purchased the land, buildings, development work, surveying and

other work in these watersheds of Lake Eleanor and Cherry.

Q. Have you stated all the value of the lands that were obtained from the Government on this project?

A. Yes.

Q. Repeat them, please.

A. $244,139.45.

Q. Have you the figures of what it cost the City and County of San Francisco to purchase the area that is indicated in red at the Moccasin Power Plant on Defendant's Exhibit A?

A. I have not the itemized figures here of the various properties. What I have is my valuation of real property owned by the City and County of San Francisco which under the charter it is my duty to prepare every year.

Q. You mean in connection with this project?

A. All properties owned by the City, and in this book is everything in connection with the Hetch Hetchy project.

Q. Would you kindly relate what the properties are that are used in connection with the Hetch Hetchy project, and their value?

A. I have before me a report showing—do you want the property as well as the price?

Q. Yes, I certainly do.

A. Tuolumne County there is a reservoir land; rights of way, reservoir land, aqueduct, power plant, regulating reservoir, rights of

way, electric transmission lines and rights of way, Hetch Hetchy railroad land and rights of way. In further toward the city I have railroad land, aqueduct and electric transmission line, with a total of $2,372,514. Those are the actual figures taken from the deeds.

Q. That likewise, is the amount of money that the City and County of San Francisco paid for aqueduct, tun- [280] nels rights of way parcels of land that were required to be acquired in fee, and, in short, the entire value of the real property involved or the easements in the Hetch Hetchy project?

A. Yes.

(b) The following testimony of R. B. Hansen, a witness for the defendant:

Q. Referring to Section 9(p) of the Raker Act, that the grantee shall construct a trail on the north side of the Hetch Hetchy reservoir site, and leading from said trail to the Tiltill Valley and to Lake Vernon, and a road or trail to Lake Eleanor and Cherry Valley via McGill Meadow, do you know the amount of money that the City and County of San Francisco expended, if any, in the carrying out of the obligations under that section of the Act?

A. I have taken from our office records the actual cost to the city of those trails as $82,670.04.

Q. In addition to that, in lieu of the building of the trails on the north side of the valley,

and constructing the road from Hetch Hetchy to all those valleys were certain amounts paid to the United States Government and accepted by the Secretary of the Interior in or about the year 1930?

A. They were. There were five payments made by the City and County of San Francisco to the United States Government, a payment of $250,000 in each of the five years, 1932 to 1936, inclusive. This gives a total of $1,250,000.

Q. The program to which you have testified which cost $1,250,000 was the program which was subsequently approved by the Board of Supervisors and followed out, was it not?

A. Yes.

Q. Now, in addition to this expenditure, did the city expend any money in the grading and construction of the present highway leading from Mather in to the Hetch Hetchy Valley, a distance of 19 miles, I think?

A. The city paid for the entire cost of this road, the total cost to the city being $353,500.91.

Q. Has that road been conveyed to the United States Government?

A. Yes, it is being used by the public.

Q. Did the City construct a road, a wagon road, from Hetch Hetchy Lake to Lake Eleanor?

A. The City constructed a wagon road leading from Hetch Hetchy Reservoir to Lake Eleanor, at the cost of about $75,000.

Q. Is that road available for public use under [281] safety restrictions?

A. Yes.

Q. Did the City also reimburse the Tuolumne Water Supply Company for sums expended by that company from 1902 to 1911 in constructing roads and trails to the Stanislaus National Forest which have later been made available to the Government and the public?

A. The City reimbursed the Tuolumne Water Supply Company to the extent of $85,000, covering work on roads and trails that had already been done by this company during the period from 1902 to 1911.

Q. What was the total of the figures which you have given as to the roads and trails constructed by the City and County of San Francisco in the National Park, or for which money was furnished either to the Government or to its predecessor in interest when the trails were later turned over to the Government?

A. This total expenditure adds up to be $1,846,170.95.

Q. Under the provisions of Section 9 (t) of the Raker Act, the grantee is required to convey to the United States a good and sufficient title to any and all tracts of land which are now owned and not actually required for use under the provisions of this Act. Did the

City expend any money in order to comply with the terms of that provision of the Act?

A. The city returned to the Government 1698.36 acres which they had bought from private parties previously.

Q. Have you the values at which these lands have been appraised, or are they combined with the purchase of water rights and other things?

A. We have appraised those at approximately $100 an acre, which gives an appraised value of $169,836.

Q. Under the terms of Section 7 of the Raker Act the City and County of San Francisco is required to pay annually to the United States sums commencing with $15,000 and at the end of ten years running up to $30,000. Have those payments been regularly made by the City?

A. They have been regularly made by the city to the United States Government.

Q. And accepted by the United States Government?

A. Yes.

Q. Those sums are remitted to the Secretary of the Interior, are they not?

A. Yes.

Q. What is the total of those sums to date including the year 1937?

A. The total including the year 1937 is $330,000. [282]

Q. Have you apportioned the proper overhead expense of engineering and administration relating to the maintenance of trails and roads, not included in the above estimate? I am referring now only to roads and trails which are conveyed to the Government or made subject to the Government's use.

A. Yes. The cost of engineering and administration and overhead expense and maintenance of roads and trails has been estimated at 10 per cent.

Q. If you add those last figures to your total paid originally for the roads and trails you get a grand total of $2,702,607, do you not?

A. Yes, that is correct.

(c) A letter dated May 18, 1928, from Hubert Work, Secretary of the Interior, to the City and County of San Francisco, previously admitted in evidence and marked "Defendant's Exhibit C".

(d) The following testimony of Willis O'Brien, a witness for the defendant:

Q. What was the total amount of the bond issue voted for this project?

A. $89,600,000.

Q. In the exhibit referred to (i. e., "Defendant's Exhibit F") it is set out year by year as to when the bonds were voted, the rates of interest, and what else does it show, briefly?

A. As to the years that they were voted, that is not shown, but the date of the bonds

are shown, for example, the bonds of the 1909 issue, January 1, 1910 issued July 1. The elections authorizing these, of course, were held some time before.

Q. It also shows, does it, what the bonded debt limit of San Francisco was on July 1, 1925?

A. It does.

Q. What is that, in your Exhibit?

A. The limit for future issues after sale of all currently authorized bonds was $12,732,588.

Q. Directing your attention to the last page of this exhibit, just explain to his Honor what that page purports to show. [283]

A. You have reference to the bond interest?

Q. Yes.

A. That schedule shows the total bond interest to June 30, 1937 with the detail there as to the issues.

Q. What is the total interest that has been paid?

A. The grand total of interest is $41,021,874.01.

(e) A three-page document dated July 1, 1925, entitled "Bonded Debt Limit", prepared by the witness Willis O'Brien, and countersigned by Harold J. Boyd, Controller of the City and County of San Francisco, showing the Bonded Debt Limit of said City and County; this document had previously been admitted in evidence and marked "Defendant's Exhibit F".

(f) The following testimony of William H. Nanry, a witness for the defendant:

Q. Mr. Nanry, assuming that the income from the hydro-electric energy marketed through the contract in question has averaged something in excess of $2,200,000 annually per year, can you state what the net effect upon the taxpayers of San Francisco would be if there was a cancellation of this contract and that income were cut off?

A. If that income would not be available from the agency agreement it would have to be made up by taxation and would require an increase of about 28 cents in the tax rate.

Q. 25 cents per hundred dollars?

A. Per hundred dollars of assessed valuation.

Q. Is that statement based upon the present assessment roll of San Francisco?

A. Current assessment roll of the city.

Counsel for the defendant duly excepted to said ruling of the Court striking out the portions of the evidence above set forth. Said ruling and exception are here designated as Ruling and Exception No. 38.

During the course of the hearing of said cause and prior to the conclusion of said hearing, counsel for the defendant moved the Court to reopen said cause and to receive the evidence theretofore offered by the defendant upon the hearing of said

cause, and to which the Court had theretofore sustained objections of counsel for the plaintiff, as herein- [284] before shown.

On April 11, 1938, the Court made an order by which it denied said last mentioned motion. Counsel for the defendant duly excepted to the ruling embodied in said last mentioned order. Said ruling and exception are here designated as Ruling and Exception No. 34.

During the course of the hearing of said cause and prior to the conclusion thereof, counsel for the defendant moved the Court to require the plaintiff to specify seriatim and severally (a) the provisions in the contract of July 1, 1925, made by The City and County of San Francisco with the Pacific Gas and Electric Company for the distribution of municipal electric energy ("Exhibit A" to the Answer of the Defendant filed herein July 20, 1937, and United States "Exhibit No. 6" at the Final Hearing), upon which the Plaintiff relies to establish that said contract is not an agency contract, but a contract of sale, and to specify (b) which of those provisions the Plaintiff claims (1) show or tend to show that the parties to said contract did not intend to make an agency contract but a contract of sale, or (2) although not showing or tending to show an intention of the parties to make a contract of sale, but rather to make one of agency, nevertheless (regardless of the intention of the parties), (a) are legally inconsistent with the idea of an agency; (b) make it impossible, as matter of

law, for the contract to be one of agency, and/or (c) convert, by operation of law, what was or may have been intended as one of agency into a contract of sale.

The Court failed and refused to grant said motion and failed and refused to direct counsel for the plaintiff to make the specifications therein mentioned, and counsel for the defendant duly excepted to said ruling of the Court failing and refusing to grant said motion, and failing and refusing to direct counsel for the plaintiff to make the specifications therein mentioned. Said ruling and exception are here designated as Ruling and Exception No. 35.

[285]

During the course of the hearing of said cause and prior to the conclusion thereof, counsel for the defendant also moved the Court that in the decision of said cause it deal, specifically, with each of the said contentions if and as made by the plaintiff aforesaid, and declare which of the said contentions, in the judgment of the Court, are sound and which are unsound; and in and by its said decisions, and in advance of any findings of fact to be made herein, furthermore and independently of said contentions specify (a) severally the provisions in the aforesaid contract, if any there be, which, in the opinion of the Court, (1) establish or tend to establish that said contract is not an agency contract, but a contract of sale, (b) show or tend to show that the parties to the contract did not intend to make any agency contract, but

a contract of sale, (c) although not showing or tending to show an intention of the parties to make a contract of sale, but rather to make one of agency, nevertheless (regardless of the intention of the parties) (1) are legally inconsistent with the idea of an agency; (2) make it impossible, as a matter of law, for the contract to be one of agency and/or (3) convert, by operation of law, what was or may have been intended as one of agency into a contract of sale.

The Court failed and refused to grant said last mentioned motion of the defendant and failed and refused to specify its decision in matters mentioned in said motion. Counsel for the defendant duly excepted to said ruling of the Court failing and refusing to grant said motion and failing and refusing to specify in its decision the matters mentioned in said motion. Said ruling and exception are here designated as Ruling and Exception No. 36.

In connection with the foregoing motions which are the subject matter of Rulings and Exceptions Numbers 35 and 36 aforesaid, the defendant stated to the Court that it made said motions and each of them so that if after learning the views of the Plaintiff and the Court, there [286] were any provisions of the agreement of July 1, 1925 in respect whereof the defendant might wish to seek or negotiate amendment thereof, to meet and overcome said views of Plaintiff and/or the Court, it (the Defendant) might have seasonable opportunity so to do.

[287]

Pages 150-152 (inclusive) deleted. [288]

On April 11, 1938, the Court rendered and filed a written opinion in said cause (later reported in 23 F. Supp. 40). Said opinion is not incorporated herein because it appears elsewhere in the record. Counsel for the defendant duly excepted to certain of the so-called findings of fact and conclusions of law contained in said Opinion. Said exceptions are hereinafter noted in connection with the exceptions to the findings of fact and conclusions of law, contained in the "Findings of Fact and Conclusions of Law", made and signed by the Court and filed herein, on June 24th, 1938, as hereinafter stated.

On April 15, 1938, the attorneys for the plaintiff, in accordance with Rule 42 of the above entitled Court, served upon the attorneys for the defendant, and lodged with the Clerk of the Court proposed "Findings of Fact and Conclusions of Law". Thereafter, on April 23rd, 1938, the defendant in accordance with said Rule 42, duly served upon counsel for the plaintiff and lodged with the Clerk of said Court, proposed amendments to said Findings of Fact and Conclusions of Law so proposed by the attorneys for the plaintiff. Said proposed "Findings of Fact and Conclusions of Law" so served and lodged on April 15, 1938, and said proposed Amendments thereto so served and lodged on April 23, 1938, as aforesaid, are not herein set forth for the reason that they were thereafter superseded and withdrawn as hereinafter stated.

On May 19, 1938, the attorneys for the plaintiff, in lieu and stead of the Findings of Fact and Conclusions of Law theretofore proposed by them and served and lodged on April 15, 1938, as aforesaid, filed, served and lodged proposed "Findings of Fact and Conclusions of Law" in said cause, which read as follows: [289]

[Title of Court and Cause.]

"FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause came on regularly for trial in the above entitled court, Honorable Michael J. Roche, Judge of said court presiding, on October 19, 1937, the plaintiff United States of America being represented by its attorneys Frank J. Hennessy, United States Attorney for the Northern District of California, W. E. Licking, Assistant United States Attorney, and Frederic L. Kirgis; the defendant City and County of San Francisco being represented by John J. O'Toole, City Attorney, Dion R. Holm, Assistant City Attorney, and Robert M. Searles; whereupon evidence both oral and documentary on behalf of the parties was offered and received and the cause regularly continued to October 21, 1937, at which time leave was granted the parties to file briefs, and said briefs having been filed and the matter argued orally by the parties on March twenty-

first and twenty-second, 1938, and the case having been submitted to the court for its decision on the latter date; the court having duly considered the evidence and the briefs and arguments of counsel and having on April 11th, 1938, rendered its decision herein in favor of plaintiff together with its written opinion in support thereof, and being fully advised in the premises, now makes the following special findings of fact and reaches the following conclusions of law:

Findings of Fact.

I.

The defendant City and County of San Francisco, hereinafter referred to as the City, is a municipal corporation of the State of California. The Pacific Gas & Electric Company, hereinafter referred to as the Company, is a private California corporation, engaged in the business of distribution and sale of electric energy in the City and County of San Francisco and elsewhere.

II.

For a number of years prior to December 19, 1913, the City had been seeking to assure itself of adequate water and low rate electricity by a plan known as the Hetch Hetchy project. By the terms of the Raker Act of December 19, 1913 (38 Stat. 242) the United States, acting through the Congress granted to the City lands and certain rights and privileges in its lands;

among the rights and privileges so granted was the right to utilize the granted lands and their appurtenant resources for the development of electric energy, including the storage and transmission of water necessary for the generation of electric energy and the transmission of electricity generated.

The grant so made by the United States was conditional upon the acceptance by the City of the terms and conditions therein specified. [290]

III.

Thereafter, the City of San Francisco, through an ordinance passed by its Board of Supervisors and approved by its Mayor, January 13, 1914, did accept said grants contained in the Raker Act and acquiesced in and became bound by the terms and conditions thereof.

IV.

To insure the direct distribution of water and electricity by the City to its inhabitants, and to prevent enjoyment by private corporations of any profits from the Government grant, it was provided in the Raker Act:

> 'Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it by the said grantee.'

V.

Prior to July 1, 1925 the City had entered into the use and enjoyment of the lands, rights and privileges granted by the Raker Act and was then, and is now, generating and transmitting electric energy through its utilization thereof.

VI.

The lands and rights acquired by the City from the United States are indispensable to the operation of the City's Hetch Hetchy project, although it includes lands and rights other than those acquired from the United States under the Raker Act.

VII.

On July 1, 1925 the City entered into a contract with the Company for the distribution and sale of electric energy generated by the City at its Moccasin Creek Power Plant, part of the so-called Hetch Hetchy project. A true and correct copy of the contract is filed with the City's answer, marked 'Exhibit A' thereof, and is made a part of this finding by reference.

VIII.

Since July 1, 1925, electric energy originating at the Moccasin Creek Power Plant of the City, and since late in 1935, the electric energy originating at the City's Early Intake plant, all generated and transmitted through utilization of the lands, rights and privileges granted

to the City by the United States, has been, and is now being delivered to the Company under the terms of the contract executed between the City and [291] the Company on July 1, 1925. Electric energy generated at both plants is hereinafter referred to as that originating at Hetch Hetchy.

IX.

Under the contract, by its terms, and as shown by the activities of the contracting parties thereunder:

1. Power developed by the City at Hetch Hetchy is delivered to the Company at its Newark sub-station, 35 miles southeast of San Francisco. Determination of how much electricity shall be accepted at any given time is made by the load dispatcher of the Company, the Company's dispatcher actually giving the orders which control the operation and output of the City's plants. From the time electric energy originating at Hetch Hetchy enters the system of the Company at Newark the City is without power over, and the Company has exclusive and entire control of, its disposition.

2. In determining the amount which should be paid to the City, it is provided that from the amount of energy delivered to the Company at Newark, 24 per cent shall be deducted as representing the amount of transmission, sub-station and distribution loss between time of receipt of receipt of the energy from the City

by the Company at Newark and delivery to the ultimate consumers. Deduction of 24 per cent of the Hetch Hetchy energy delivered by the City to the Company at Newark is simply a necessary factor in the formula for ascertainment of the amount to be paid by the Company to the City as a fair price for such energy.

3. By the terms of the contract the Company is required to "account for and pay over to the City for the energy so consigned and delivered to it by the City of Newark for transmission and distribution to consumers as provided in this contract 24.935 per cent of 2.383 cents per kilowatt hour, (the average revenue received by the Company in 1924) for 76 per cent of the energy so consigned and delivered by the City to it at Newark. And the Company shall retain * * * 73.065 per cent as its compensation for services rendered under this contract." The proportional percentages—26.935 and 73.065—were to remain fixed during the life of the contract between the City and the Company. As rates varied, amounts of payments to the City were to be adjusted accordingly.

In actual practice the amount per unit received by the City for its electric energy delivered under the contract has remained constant, despite several reductions in the rates charged by the Company and appreciable fluctuation in the average amount per unit received by the Company from its sale. The price, therefore,

which the City receives for its energy under the contract is in practice fixed and without relation to the actual [292] revenue received from its sale to consumers.

4. With exceptions here immaterial the Company accepts at Newark the entire output of energy from Hetch Hetchy at not to exceed a 75 per cent monthly load factor. Monthly payments by the Company to the City are based upon the amount of energy actually delivered into the Company's system at Newark, or, in event of failure of the Company to take the available output of the City's plant deliverable at Newark under the contract, upon the amount which the City could have delivered at a 75 per cent load factor. The City is assured of payment and the Company is under an absolute duty to pay for the amount of electric energy specified without regard to its acceptance or use.

5. The rates charged to consumers of electric energy originating at Hetch Hetchy are fixed not by the City but by the State Railroad Commission. Under the State Constitution, municipalities are not subject to commission regulation, as a principal the City has power thereunder to fix rates for electric energy produced by it, and sold by an agent, if there be an agent.

6. Electric energy originating at Hetch Hetchy is disposed of by the Company to its

usual customers in the normal course of its retail trade.

7. The Company is the sole creditor named in the statements of account furnished by it to purchasers of electric energy including that originating at Hetch Hetchy.

8. Moneys collected by the Company from consumers of power are in no way, arbitrarily or otherwise, segregated or apportioned with regard to the portion thereof deemed attributable to power produced at Hetch Hetchy.

9. To the City the Company makes no accounting of its sales of electricity to consumers. Accounting between the two is limited to monthly statements by the City to the Company for electricity delivered at Newark.

10. The City is itself a purchaser from the Company of power, part of which originates at Hetch Hetchy, and on terms which have no relation to those specified in the contract for sale of Hetch Hetchy power to the Company by the City.

11. The contract is terminable by either the City or the Company upon one day's notice; and is by its terms subject to cancellation upon request of the Secretary of the Interior should he determine the agreement to be violative of any section of the Raker Act.

X.

The contract between the City and the Company is [293] a contract to sell for resale, and

the disposal of electric energy thereunder by the City to the Company constitutes a sale for resale of, electric energy generated by the City at Hetch Hetchy. The contract to sell contemplates, and the sale of energy thereunder includes, a sale or letting to the Company of the right to resell or sublet the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark.

XI.

The contract between the City and the Company and the disposal of electric energy thereunder by the City to the Company includes a sale or letting by the City to the Company of the right to resell or sublet the electric energy so delivered by the City to the Company.

XII.

The Secretary of the Interior is designated by the Raker Act to safeguard the interest of the United States in its grant. Pursuant to such duty imposed by the Act, the Secretary of the Interior determined that the conditions of the Act were not being 'reasonably complied with and carried out by the grantee' and on or about August 24, 1935, notified the City that its disposal of electric energy generated at Hetch Hetchy was in violation of the provisions of the Act quoted in Finding IV. Finally, more than 18 months later and on March 30, 1937,

the City stated that it would continue such disposal until after court action. Thereupon the said Secretary of the Interior, on April 2, 1937, in accordance with the provisions of the Raker Act, requested the Attorney General in the name of the United States to commence suit for the purpose of enforcing and carrying out the provisions of that Act.

XIII.

The City is now selling or letting to the Company, the right to sell or sublet the electric energy generated at Hetch Hetchy and delivered by the City to it, and unless restrained will continue to so dispose of said power and to so sell or let to that Company the right to sell or sublet the electric energy delivered to it under the contract.

Conclusions of Law

From the foregoing Findings of *Act,* the Court reaches the following conclusions of Law:

I.

The contract to sell, and the sale of, electric energy by the City to the Company for resale is a selling or letting to said Company of the right to resell [294] the same, prohibited by and in violation of, the provisions of the Raker Act, prohibiting such selling or letting.

II.

The contract between the City and Company is a grant by the City to the Company of the right to sell electricity produced by the City at Hetch Hetchy, and its performance by the parties is a selling or letting to said Company of the right to resell the same, all within the prohibition of Section 6 of the Raker Act and hence a violation of that statute.

III.

The provisions of Section 6 of the Raker Act are a part of a valid statute enacted by Congress in the exercise of its legislative power over public lands and having the force of law in its entirety. Enforcement of the express terms of the statute is not subject to estoppel or other equitable defense.

The motion of the United States to strike evidence of the City relating to these defenses must be granted and the motion of the City to reopen the case for the introduction of similar evidence must be denied.

IV.

The United States has no plain, speedy or adequate remedy at law.

V.

The United States is entitled to an injunction perpetually restraining the defendant, the City and County of San Francisco, from its present

disposal of said energy, or from any disposal thereof whereby the right to resell such energy is let or sold to any private corporation or individual and in default thereof enjoining and restraining the defendant from continuing to utilize the lands, rights and privileges granted by the Raker Act for the purpose of the generation of electric energy for such disposal.

Done in Open Court this —— day of May, 1938.

.....

United States District Judge.

Service of the above and receipt of copy thereof acknowledged this 18th day of May, 1938.

JNO. J. O'TOOLE
DION R. HOLM
ROBERT SEARLS
Attorneys for Defendant. [295]

Approved as to Form this 18th day of May, 1938, as provided by Rule 22:

JNO. J. O'TOOLE
DION R. HOLM
ROBERT SEARLS
Attorneys for Defendant."

On May 31, 1938, the attorneys for the defendant duly proposed amendments and additions to the proposed "Findings of Fact and Conclusions of Law" served and lodged by the attorneys for the plaintiff on May 19, 1938, as aforesaid. Defendant's said proposed amendments and additions to said

last mentioned "Findings of Fact and Conclusions of Law", proposed by attorneys for the plaintiff, as aforesaid, read as follows:

[Title of Court and Cause.]

"DEFENDANT'S PROPOSED AMENDMENTS AND ADDITIONS TO 'FINDINGS OF FACT AND CONCLUSIONS OF LAW' PROPOSED BY PLAINTIFF AND SERVED MAY 19, 1938.

The defendant in the above entitled cause, (a) in accordance with Rule 42 of this Court, proposes each of the following amendments and additions to the 'Findings of Fact and Conclusions of Law' in said cause proposed by plaintiff herein, and served upon said defendant on May 19, 1938, and (b) requests a hearing by the Court with respect to said proposed amendments and additions to said proposed Findings.

1. On page 2, line 30 of said proposed Findings, strike out the words: 'and low rate electricity'.

2. On page 3, line 2, after the words 'its lands' insert the words: 'therein described'.

3. On page 3, line 7 of said proposed Findings, after the word 'generated', insert the following:

'The location and extent of the lands and rights of way so granted to defendant under said Raker Act are correctly shown on "Defendant's Exhibit A" in evidence herein'.

4. On page 3, lines 15-16 of said proposed Findings, strike out the words: 'and acquiesced in, and became bound by the terms and conditions thereof.' [296]

5. Page 3, lines 19 to 22, of said proposed Findings, strike out the words:

> 'To insure the direct distribution of water and electricity by the City to its inhabitants, and to prevent enjoyment by private corporations of any profits from the Government grant'.

and commence the following word 'it' with a capital.

6. On page 3, line 27 of said proposed Findings, after Finding 'IV' insert the following:

'IV A

Among the provisions of said Raker Act were the following appearing in Section 9 thereof:

> "(b) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated and which may be so beneficially used by said irrigation

districts or municipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein; Provided, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(c) That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be [297] made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy as follows: The said grantee shall within three years from the date of

completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further,

said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file such maps, surveys, field notes, or other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(d) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale, such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interest demands or convenience requires: and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, [298] in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use and sale

of such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower; and for that purpose the Secretary of the Interior may take possession of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed by the grantee hereunder as may be necessary for the development, transmission, use, and sale of such power.

(e) That the rates or charges to be made by the grantee or by any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior, allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee".

7. On page 4, line 1 of said proposed Findings, add the following:

'in connection with the utilization of lands, rights and privileges owned by the City and acquired by it from other sources'.

8. On page 4, line 5 of said proposed Findings, after the word 'United States' insert: 'under the Raker Act'.

9. On page 4, line 6 of said proposed Findings, strike out the word 'it', and in lieu thereof insert the words: 'said project'.

10. On page 4, lines 7 and 8 of said proposed Findings, insert the word 'so' before the word 'acquired' on line 8, and strike out the balance of the sentence.

11. On page 4, line 9 of said proposed Findings, insert a new paragraph to be numbered 'VI A' which shall read as follows:

'VI A

In conformity with the provisions of said Raker Act, and prior to July 1, 1925, the defendant had expended over $45,000,000.00 in the con- [299] struction of dams, aqueducts, and works, designed to store and deliver a municipal water supply to its inhabitants, had built the Early Intake power house, primarily for the supply of power for construction purposes on the project, and had completed the Moccasin power house capable of generating 80,000 horsepower of hydro-electric energy, and a transmission line ade-

quate to transmit said energy to Newark in Alameda County; the defendant had not acquired and never has been financially able to acquire any distribution system in the City and County of San Francisco or elsewhere for the distribution of such electric energy to consumers; the Company and Great Western Power Company (later consolidated with the Company) were at that time the only distributing companies owning electric distribution systems in San Francisco, and each of them declined to sell or lease its distribution system to the defendant for the purpose of enabling it to distribute thereby to its inhabitants the electric energy generated by it in connection with its said Hetch Hetchy project.'

12. On page 4, line 25 of said proposed Findings, after the words 'United States', insert the following:

'in connection with lands, water rights, easements and privileges owned by the City and acquired by it from other sources,'

13. On page 4, line 28 of said proposed Findings, after the figures '1925' insert the following:

'There never has been and there is not any contract or arrangement between the City and the Company with respect to the delivery and/or distribution of said electric

energy, other than said contract of July 1, 1925'.

14. On page 4, line 29 of said proposed Findings, after the words: 'Hetch Hetchy' insert the following:

'About 3 per cent. of the energy so generated and transmitted is produced in a power plant known as the Early Intake power plant, which is situate on lands granted to the City under the terms of said Raker Act; that the remaining 97 per cent. of said energy is generated in the Moccasin Creek power plant, which is situated entirely on patented land owned by the City, and that the electric energy generated therein, together with the surplus energy from the Early Intake plant, is transmitted from Moccasin power plant to Newark in Alameda County, over lands owned by the City and not acquired by it under the terms of the Raker Act; the only use made by the City of rights granted to it under the Raker Act in connection with said Moccasin Creek plant is the storage of water in the Hetch Hetchy Valley and at Lake Eleanor, partially on [300] lands granted under the Raker Act, and the transmission of said water through tunnel aqueducts and canals partially on lands granted under the Raker Act; the primary purpose of said reservoirs and aqueducts is to transmit water to San Francisco for municipal water supply purposes; said water would be so transmitted whether the Moccasin Creek power plant,

which is on the line of the water conduit, were operated or not'.

15. On page 5, strike out lines 3 and 4 of said proposed Findings, and in lieu thereof insert the following:

'In carrying out said contract of July 1, 1925, the City and the Company have proceeded as follows:'

16. On page 5, line 7 of said proposed Findings, insert before the word 'Determination' the words: 'Subject to the provisions of said contract', and change the 'D' in 'Determination' to a small letter.

17. On page 5, line 14 of said proposed Findings, insert after the word 'disposition', the words:

'but in a physical sense only and subject to the provisions of said contract of July 1, 1925'.

18. On page 5, line 16 of said proposed Findings, strike out the words: 'it is provided that from' and in lieu thereof insert the words: 'the parties to said contract deducted'

19. On page 5, lines 17 and 18 of said proposed Findings, strike out the words: 'shall be deducted' and in lieu thereof insert the word: 'thereof'.

20. On page 5, lines 19 and 20 of said proposed Findings, strike out the words: 'of receipt' which are repetitious.

21. On page 5, lines 21 to 25 of said proposed Findings, strike out the sentence commencing with the words: 'Deduction of 24 per cent' and ending with the words: 'for such energy'.

22. On page 6, line 14 of said proposed Findings, strike out the words: 'under the contract' and insert the word 'exact' at the end of said line.

23. On page 6, line 16 of said proposed Findings, after the word: 'consumers' insert the following:

'to the extent that payments made to the City are computed in accordance with the formula prescribed in said contract, and have not taken into account changes made by the Railroad Commission of Calif- [301] ornia in each of the years 1935, 1936 and 1937, in respect of the rates chargeable to consumers".

24. On page 6, between lines 16 and 17 of said proposed Findings, insert three new paragraphs to be numbered '3a', '3b' and '3c', which shall read as follows:

'3a. In and by said contract of July 1, 1925, it is provided that the rates at which the electric energy delivered by the City to the Company under said contract shall be sold to consumers in the City and County of San Francisco, shall be those fixed by the Railroad Commission of the State of California; said rates are the rates which at all

times since July 1, 1925 have been and are now operative and binding upon the Company with respect to all electric energy generated by it which it sells in said City and County of San Francisco; said rates were adopted by the City and the Company in and by said contract of July 1, 1925, as the rates which should be charged to consumers of the electric energy generated by the City and delivered by it to the Company for transmission and distribution, as provided in said contract, for the reason that it would be impractical to charge consumers of electric energy generated by the Company at one rate, and to charge consumers of the electric energy generated by the City at a different rate;

Sb. Since the execution of said contract of July 1, 1925, the City has received and is still receiving for the electric energy delivered by it to the Company the percentage of the average rate paid to the Company by consumers in the City and County of San Francisco, which in and by said contract it is provided that it shall receive; said average rate as fixed by said contract has remained constant, however, and has not been varied to conform to the rates fixed by the Railroad Commission of California in the years since the execution of said contract; as the result of the failure to vary said average rate of return to conform to the rates fixed by said

Railroad Commission; the City has received from the Company $25,000.00 more than it would have received if said return had varied in conformity with the rates fixed by said Railroad Commission as by said contract it is provided that said return should vary;

3c. The net revenue to the City from the disposition and distribution of the electric energy generated by it, in accordance with the aforesaid contract of July 1, 1925, between the City and the Company, is and at all times has been approximately $2,200,000.00 per year.' [302]

25. On page 6, lines 25 to 28, inclusive, of said proposed Findings, strike out the sentence commencing with the words: 'The City is assured' and ending with the words: 'its acceptance or use'.

26. On page 6, lines 30 and 31 of said proposed Findings, after the words: 'are fixed', strike out the words: 'not by the City but by the State Railroad Commission', and in lieu thereof insert the following:

'not by the Railroad Commission of California, but by the City, which, however, adopts the rates prescribed by said Railroad Commission of California, as the rates which may be charged by private utility corporations to consumers of electric energy'.

27. On page 7, lines 4 to 6 of said proposed Findings, strike out all of the paragraph numbered 6 and in lieu thereof insert the following:

'6. Electric energy originating at Hetch Hetchy is distributed by the Company, in the normal course of its business, to the persons, firms and corporations who are customers therefor at the time of distribution'.

28. On page 7, lines 14 to 17 of said proposed Findings, strike out all of paragraph '9' and in lieu thereof insert the following:

'Except as next stated, the Company makes no accounting to the City of its sales of electricity to consumers. The amount of electricity delivered to the Company by the City at Newark is determined by joint meter readings at Newark, and the formulae specified in the contract of July 1, 1925, are applied to said quantity and the City merely bills the Company for said quantity in accordance with said formulae'.

29. On page 7, lines 21 and 22 of said proposed Findings, strike out the words: 'for sale of Hetch Hetchy power to the Company by the City', and in lieu thereof insert the following:

'of July 1, 1925. The power so purchased by the City from the Company, however, has different characteristics from that delivered by the City to the Company at Newark; after

receiving the energy at Newark the Company steps down the voltage of said energy and regulates it through transformers and condensors; for municipal railway use, it converts a large part of the current from alternating current with a 60 cycle frequency to direct current having no frequency, radically changes the load factor, and, by its standby service, protects the City's requirements [303] for electric energy for the various purposes for which it is used by the City'.

30. On page 7, line 25 of said proposed Findings, after the word: 'cancellation' insert the words: 'by the parties'.

31. On page 7 of said proposed Findings, strike out all of paragraph 'X' from the 'Findings of Fact', because the subject matter thereof is not a finding of fact, but is a conclusion of law, and, as such, should be included in the 'Conclusions of Law', if the subject matter is to be, at all, included in the 'Findings of Fact and Conclusions of Law', in said cause.

32. On page 8 of said proposed Findings, strike out all of paragraph 'XI' from the 'Findings of Fact', because the subject matter thereof is not a finding of fact, but is a conclusion of law, and, as such, should be included in the 'Conclusion of Law', if the subject matter thereof is to be, at all, included in the 'Findings of Fact and Conclusions of Law', in said cause.

33. On page 8, line 16 of said proposed Findings, change the figure 'XII' to 'X'.

34. On page 9 of said proposed Findings, strike out the figure 'XIII' and all of the paragraph of that number, and in lieu thereof insert the following:

'XI.

Unless restrained by this Court, the City will continue to dispose of the electric energy generated by it at Hetch Hetchy in the manner hereinbefore stated'.

35. On page 9, line 10 of said proposed Findings, insert four new paragraphs to be numbered: 'XII', 'XIII', 'XIV' and 'XV', which shall read, respectively, as follows:

'XII.

The manner of disposition and distribution by the City of the electric energy generated by it in connection with its Hetch Hetchy project, in accordance with the aforesaid contract of July 1, 1925, ("United States Exhibit 6"), has not, at any time, damaged, and does not damage, the plaintiff in any respect or to any extent or in any amount;

XIII.

If the City shall be prevented from disposing of the electric energy generated by it in connection with its Hetch Hetchy project, as provided in said contract of July 1, 1925

("United States Exhibit 6"), or in some other manner by which it shall be permitted to use the transmission [304] and distribution facilities of a private corporation for such purpose, it will suffer a loss of approximately $2,200,000.00 per year and will be damaged in that amount and to that extent.

XIV.

Any sudden disruption of operations under said contract of July 1, 1925, ("United States Exhibit 6") or any sudden cessation of the disposal and distribution of the electric energy generated by the City at its above mentioned power plants in connection with the so-called Hetch Hetchy water project, in the manner provided in said contract, would result in serious economic waste; for said reason, the City should be allowed a reasonable period within which to provide a mode of disposing of and distributing said electric energy, which will not violate the provisions of the Raker Act; a reasonable period to allow the City for said purpose is one year, to commence on the day when the decree herein shall become final; the injunction to be issued herein should not be issued prior to the expiration of said period.

XV.

It is appropriate that the Court reserve jurisdiction of the cause for the purpose of

modifying its Decree to be entered herein, so as to permit the City to transmit and distribute the electric energy generated by it in connection with its said Hetch Hetchy project, either by contract with a private corporation, or otherwise, in a manner which will not constitute a violation of the Raker Act'.

36. On page 9, lines 18 to 22, inclusive, of said proposed Findings, strike out the first of the 'Conclusions of Law' and in lieu thereof insert the following:

'The contract of July 1, 1925 is a contract to sell for resale the electric energy generated by the City at Hetch Hetchy; said contract contemplates a sale of electric energy thereunder, includes a sale to the Company by the City of the right to resell the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark; said contract is prohibited by and is in violation of the provisions of the Raker Act prohibiting such sale'.

37. On page 9, strike out the second of the 'Conclusions of Law' and in lieu thereof insert the following:

'The contract between the City and the Company is a grant by the City to the Company of the right to sell the electric energy generated by the City at Hetch Hetchy and is

a [305] selling to the Company of the right to sell said electric energy in violation of the prohibition of Section 6 of the Raker Act'.

38. On page 10, lines 9 to 12: Strike out the sentence within these lines commencing with the words: 'The motion of the United States' and ending with the words: 'must be denied', because the orders relating to the motions mentioned are intermediate orders, unrelated to the decision of the case, and have no place in the Findings of Fact or Conclusions of Law.

39. On page 10, line 19, before the words: 'United States', insert the following:

'Subject to the provisions of the next succeeding paragraph "VI" hereof,'

40. On page 10, line 28, insert the following:

'The United States is entitled to a decree which shall order, adjudge and decree as follows:

(1) That, one (1) year after this Decree shall have become final, either through the lapse of the time limited for an appeal therefrom without any appeal having been taken, or through the affirmance by the Court, which shall have finally disposed of any appeal taken therefrom, the Clerk of this Court issue out of this Court and under the seal thereof, a Writ of Injunction directed to the

defendant and enjoining and restraining it from distributing or otherwise disposing of the electric energy generated by it at Moccasin Creek Power House and/or Early Intake Power House in connection or in conjunction with its so-called Hetch Hetchy Water project, in the manner provided in said contract of July 1, 1925, ("United States Exhibit 6"), and directing that unless it shall cease from distributing or otherwise disposing of said electric energy in the manner provided in said last mentioned contract, it be enjoined and restrained from using for the generation and transmission of said electric energy, any of the rights granted to it in and by the Statute of the United States, approved December 19, 1913 (38 Stats. at L. 241) commonly known as and called the Raker Act.

(2) That each of the parties hereto bear and pay its costs of suit herein.

(3) That the defendant shall have the right to submit to the Court at any time any plan, contract or arrangement for the transmission, distribution and disposal of the electric energy generated by it in connection with its Hetch Hetchy project which, in its opinion, does not constitute a violation of the provisions of [306] said Raker Act, and to apply to the Court at the foot of the decree for a modification of said decree and of the injunction thereby directed to issue, which will per-

mit it to transmit, distribute and dispose of said electric energy in accordance with such plan, contract or arrangement, and the Court hereby retains jurisdiction of the cause for the purpose of entertaining such application, if any be made, and of granting the same if, upon the proof offered in support thereof, it shall seem proper so to do.'

By proposing the foregoing Amendments and Additions to said 'Findings of Fact and Conclusions of Law' served May 19, 1938, as aforesaid, the defendant (1) does not concede or admit that the Findings of Fact and Conclusions of Law so proposed to be modified by said proposed amendments and additions, would be a proper Finding of Fact and/or Conclusion of Law to be made by this Court in said cause, if modified as proposed; (2) does not waive its right to object to any of said Findings of Fact and Conclusions of Law, as modified, if the proposed modification thereof, be allowed and adopted; and (3) does not concede, but, on the contrary, denies that any of the so-called Findings of Fact contained in paragraph IX of said proposed 'Findings of Fact and Conclusions of Law', so served on May 19, 1938, or any of the other so-called Findings of Fact contained in said proposed 'Findings of Fact and Conclusions of Law', so served May 19, 1938, which purports to construe the meaning or effect of

the aforesaid contract between the City and the Company dated July 1, 1925, is a proper subject matter of a finding of fact."

Dated: June 1, 1938.

Respectfully submitted,
JNO. J. O'TOOLE,
DION R. HOLM,
Attorneys for Defendant.

ROBERT M. SEARLS,
Of Counsel for Defendant.

Service of the foregoing Amendments and Additions proposed by the defendant to the Draft of Findings of Fact and Conclusions of Law in the above cause, proposed by the Plaintiff, is hereby acknowledged this 31st day of May, 1938.

FRANK J. HENNESSY,
Attorney for Plaintff."

On June 3, 1938, a hearing was had before the Court to settle the Findings of Fact and Conclusions of Law in said cause. [307]

At said hearing of June 3, 1938, for the settlement of the "Findings of Fact and Conclusions of Law" in said cause, counsel for the plaintiff consented that the requests contained in the paragraphs numbered 1, 2, 8, 9, 10, 20, 30 and 38 of Defendant's said "Proposed Amendments and Additions to 'Findings of Fact and Conclusions of Law' Proposed by Plaintiff", (hereinafter, for brevity, called

"Defendant's Proposed Amendments") which were served and lodged on May 31, 1938, as aforesaid, be granted. At said hearing for the settlement of "Findings of Fact and Conclusions of Law" in said cause, counsel for the plaintiff, also, consented that the Court might strike out the words "to its inhabitants" appearing in paragraph IV (on line 20 of page 3) of Plaintiff's said proposed "Findings of Fact and Conclusions of Law" which was part of the matter contained in the paragraph numbered 5 of Defendant's aforesaid proposed amendments.

At said hearing of June 3, 1938, counsel for the plaintiff opposed the allowance of each and every of the requests contained in the other numbered paragraphs of defendant's said proposed amendments and additions to plaintiff's proposed "Findings of Fact and Conclusions of Law".

At said hearing of June 3, 1938, the Court allowed all of defendant's proposed amendments to said "Findings of Fact and Conclusions of Law", to the allowance of which counsel for the plaintiff consented as aforesaid, and took under submission for further consideration all of defendant's other proposed amendments to plaintiff's proposed "Findings of Fact and Conclusions of Law".

On June 24, 1938, the Court made, signed and filed its "Findings of Fact and Conclusions of Law" in said cause (said Findings of Fact and Conclusions of Law are not incorporated herein except by reference as they appear elsewhere in the record), and, except as next hereinafter stated, omitted

therefrom all of the matters covered by Defendant's said proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law", which it had not allowed at said hear- [308] ing, with consent of counsel for the plaintiff, as aforesaid, and, except as next hereinafter stated, impliedly denied and disallowed in toto each and all of defendant's said other proposed amendments to plaintiff's said proposed "Findings of Fact and Conclusions of Law".

The exceptions mentioned in the last preceding sentence are as follows:

(a) In sub-paragraph 4 of Paragraph IX of the Court's "Findings", the word "direct" appearing between the words "without relation" was inserted by the Court, instead of the word "exact", as requested by defendant in the paragraph numbered 22 of its aforesaid proposed amendments.

(b) The Court omitted from its Findings, the words "and became bound by", which appeared in paragraph III of plaintiff's said proposed Findings, and were part of the words sought to be stricken out in the paragraph numbered 4 of defendant's said proposed amendments.

(c) The Court did not include in its said Findings the paragraph numbered XI in plaintiff's said proposed Findings, and thereby allowed the amendment requested in paragraph 32 of defendant's said proposed amendments.

(d) The Court included in its "Conclusions of Law", a paragraph numbered "V", which incorpo-

rates a part of the request contained in sub-paragraph 3 of the paragraph numbered 40 of defendant's aforesaid proposed amendments.

The rulings of the Court which denied defendant's requests contained in the paragraphs numbered 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 34, 35, 36, 37, 39 and 40 of defendant's aforesaid proposed amendments and refused to find in accordance therewith, and defendant's exceptions to said respective rulings are here designated as Rulings and Exceptions [309] 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, and 66, respectively.

As hereinbefore stated counsel for the defendant duly excepted to certain of the findings of fact contained in the Opinion of the Court rendered and filed herein on April 11th, 1938, as aforesaid, and to the rulings involved in the making of said findings of fact. The findings of fact contained in said Opinion to which counsel for the defendant excepted and the numbers of the rulings and exceptions with respect to the same are as next stated:

(a) The finding that the provisions of Section 6 of the Raker Act are an integral part of a statute enacted by Congress in the exercise of its law-making power and not provisions set up by the Congress in the exercise of proprietary powers of the United States.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 67.

(b) The finding that "the City itself purchases electricity from the Company just as any other customer does".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 68.

(c) The finding that "control of Hetch Hetchy power is in the hands of the Company from the moment that City electricity enters the Company's lines at Newark".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 69.

(d) The finding that "rates to be charged consumers of Hetch Hetchy power are not fixed by the City". [310]

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 70.

(e) The finding that electrical energy "cannot be allocated on a pro rate basis when a commingling occurs".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 71.

Counsel for the defendant, also, duly excepted to certain of the conclusions of law contained in the Opinion of the Court rendered and filed in said cause on April 11, 1938, as aforesaid, and to the rulings involved in the drawing of said conclusions of law. The conclusions of law in said Opinion to

which counsel for the defendant excepted and the numbers of the rulings and exceptions with respect to the same, are as next stated:

(a) The conclusion of law that the agreement of July 1, 1925, between the City and the Company is "one of sale, with title to the electricity passing to the Company at Newark".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 72.

(b) The Conclusion of Law that the arrangement for the distribution and disposal of electric energy effected by the agreement of July 1, 1925, between the City and the Company complied "neither with the letter nor the spirit of the Federal Grant by means of which San Francisco was enabled to construct the Hetch Hetchy project".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 73.

(c) The Conclusion of Law that "the Raker Act is not being [311] complied with by San Francisco".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 74.

(d) The Conclusion of Law that the plaintiff "is entitled to an injunction directing the City to cease its present disposal of electric power or be restrained from using the rights granted by the Raker Act for the generation and transmission of such power".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 75.

(e) The implied Conclusion of Law that the provisions of Section 6 of the Raker Act are conditions, the violation of which would involve or justify a forfeiture of the or any of the rights granted by the Raker Act.

The ruling involved in the drawing of said implied conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 76.

(f) The Conclusion of Law that the City should be restrained from using, for the generation and transmission of electric energy, the rights granted by the Raker Act, unless it desists from distributing and disposing of said electric energy in accordance with the agreement of July 1, 1925, between it and the Company.

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 77.

Counsel for the defendant, also, duly excepted to certain of the findings of fact included in the "Findings of Fact and Conclusions of Law" made, signed and filed in said cause by the Court on June 24, 1938, as aforesaid, and to the rulings involved in the making of said [312] findings of fact. The last mentioned findings of fact to which counsel for the defendant excepted, and the numbers of the rulings

and exceptions with respect to the same are as next stated:

(a) The Finding (in Paragraph IV of the Court's "Findings of Fact") that the provisions of Section 6 of the Raker Act were incorporated in said Act to insure the direct distribution of electricity by the City.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 78.

(b) The Finding (in Paragraph IV of the Court's "Findings of Fact") that the provisions of Section 6 of the Raker Act were incorporated in said Act "to prevent enjoyment by private corporations of any profits from the" grant made by the Raker Act.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 79.

(c) The implied Finding (in Paragraph IV of the Court's "Findings of Fact") that the City is now generating and transmitting electricity, solely, through the utilization of the lands, rights and privileges granted to it by the Raker Act and not through the use of said lands, rights and privileges in conjunction with the use of said lands, rights and privileges owned by the City and acquired by it from persons, firms and corporation, other than the United States.

The ruling involved in the making of said implied finding and the defendant's exception thereto

are here designated as Ruling and Exception No. 80.

(d) The Finding (in subparagraph 1 of Paragraph IX of the Court's "Findings of Fact") that "determination of how much electricity shall be accepted at any time is made by the load dispatcher of the Com- [313] pany, the Company's dispatcher actually giving the orders which control the operation and output of the City's plants", which said finding is unqualified by and gives no effect to the provisions of the agreement of July 1, 1925, dealing with the subject matter.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 81.

(e) The Finding (in subparagraph 1 of Paragraph IX of the Court's "Findings of Fact") that "from the time electric energy originating at Hetch Hetchy enters the system of the Company at Newark, the City is without power over, and the Company has exclusive and entire control of, its disposition" which said finding is unqualified by and gives no effect to the provisions of the agreement of July 1, 1925, dealing with the subject matter.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 82.

(f) The Finding (in subparagraph 2 of Paragraph IX of the Court's "Findings of Fact") that "In determining the amount which should be paid to the City, it is provided that from the amount of

energy delivered to the Company at Newark, 24 per cent shall be deducted as representing the amount of transmission, sub-station and distribution loss between time of receipt of the energy from the City by the Company at Newark and delivery to the ultimate consumers", which said finding is unqualified and treats the 24 per cent deduction mentioned therein as a mere factor for determining the price to be paid by the Company to the City, and gives no effect to the fact that 24 per cent is the amount of transmission, substation and distribution losses, actually found by experience to occur between Newark and consumers' meters in San Francisco. [314]

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 83.

(g) The finding (in subparagraph 3 of Paragraph IX of the Court's "Findings of Fact") that "The price which the City receives for its energy under the contract is in practice fixed and without direct relation to the actual revenue received from its sale to consumers", which said finding is unqualified and gives no effect to the fact that the price which the City receives from the Company is without direct relation to the actual revenue received by the Company from its sales to consumers only in the sense and to the extent that payments made to the City have been computed in accordance with the formula specified in the agreement of July 1, 1925, and have not taken into account certain de-

ductions in rates made by the Railroad Commission of the State of California in each of the years 1935, 1936 and 1937.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 84.

(h) The unqualified finding (in subparagraph 5 of Paragraph IX of the Court's "Findings of Fact") that "The rates charged to consumers of electric energy originating at Hetch Hetchy are fixed not by the City but by the State Railroad Commission".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 85.

(i) The unqualified finding (in subparagraph 6 of Paragraph IX of the Court's "Findings of Fact") that the "Electric energy originating at Hetch Hetchy is disposed of by the Company to its usual customers in the normal course of its retail trade", without qualifying said finding by the further finding that said customers of the Company were, also, in fact, customers of the defendant. [315]

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 86.

(j) The unqualified finding (in subparagraph 9 of Paragraph IX of the Court's "Findings of Fact") that "To the City the Company makes no accounting of its sales of electricity to consumers".

The ruling involved in the making of said finding

and the defendant's exception thereto are here designated as Ruling and Exception No. 87.

(k) The finding (in subparagraph 9 of Paragraph IX of the Court's "Findings of Fact") that the accounting between the City and the Company "is limited to monthly statements by the City to the Company for electricity at Newark".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 88.

(l) The unqualified finding (in subparagraph 10 of Paragraph IX of the Court's "Findings of Fact") that "The City is itself a purchaser from the Company of power, part of which originates at Hetch Hetchy, and on terms which have no relation to those specified in the contract for sale of Hetch Hetchy power to the Company by the City".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 89.

(m) The finding (in Paragraph X of the Court's "Findings of Fact") that the contract between the City and the Company is a contract to sell for resale.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 90. [316]

(n) The finding (in Paragraph X of the Court's "Findings of Fact") that the disposal of electric energy by the City to the Company under the contract of July 1, 1925, constitutes a sale for resale of

electric energy generated by the City at Hetch Hetchy.

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 91.

(o) The finding (in Paragraph X of the Court's "Findings of Fact") that "The contract to sell contemplates, and the sale of energy thereunder includes, a sale and letting to the Company of the right to resell or sublet the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 92.

(p) The finding (in Paragraph XII of the Court's "Findings of Fact") that "The City is now selling or letting to the Company, the right to sell or sublet the electric energy generated at Hetch Hetchy and delivered by the City to it".

The ruling involved in the making of said finding and the defendant's exception thereto are here designated as Ruling and Exception No. 93.

(q) The finding (in Paragraph XII of the Court's "Findings of Fact") that unless restrained, the City will "continue to so dispose of said power and to so sell or let to that Company the right to sell or sublet the electric energy delivered to it under the contract" of July 1, 1925.

The ruling involved in the making of said finding and the defendant's exception thereto are here

designated as Ruling and Exception No. 94. [317]

Counsel for the defendant, also, excepted to certain of the Conclusions of Law contained in the "Findings of Fact and Conclusions of Law" made, signed and filed in said cause by the Court on June 24, 1938, as aforesaid, and to the rulings involved in the drawing of said conclusions of law. The last mentioned conclusions of law to which counsel for the defendant excepted, and the numbers of the rulings and exceptions with respect to the same are as next stated:

(a) The conclusion of law (in Paragraph I of the Court's "Conclusions of Law") that the method of disposal by the City to the Company of the electric energy in accordance with the contract of July 1, 1925, "includes a selling and letting by the City to the Company of the right to sell or sublet" such energy.

The ruling involved in the drawing of said conclusions of law and the defendant's exception thereto are here designated as Ruling and Exception No. 95.

(b) The conclusion of law (in Paragraph I of the Court's "Conclusions of Law") that the method of disposal by the City to the Company of the electric energy in accordance with the contract of July 1, 1925, is within the prohibition of Section 6 of the Raker Act.

The ruling involved in the drawing of said conclusions of law and the defendant's exception thereto are here designated as Ruling and Exception No. 96.

(c) The conclusion of law (in Paragraph III of the Court's "Conclusions of Law") that the provisions of Section 6 of the Raker Act "are a part of a valid statute enacted by Congress in the exercise of its legislative power over public lands and having the force of law in its entirety".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 97.

[318]

(d) The conclusion of law (in Paragraph II of the Court's "Conclusions of Law") that enforcement of the express provisions of Section 6 of the Raker Act "is not subject to estoppel or other equitable defense".

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 98.

(e) The conclusion of law (in Paragraph III of the Court's "Conclusions of Law") that the United States has no plain, speedy or adequate remedy at law.

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 99.

(f) The conclusion of law (in Paragraph IV of the Court's "Conclusions of Law") that the plaintiff is entitled to an injunction perpetually restraining the defendant from disposing, in accordance with the agreement of July 1, 1925, between the defendant and the Company, of electric energy gen-

erated by the City in connection with its Hetch Hetchy project.

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 100.

(g) The implied conclusion of law (in Paragraph IV of the Court's "Conclusions of Law") that the provisions of Section 6 of the Raker Act are conditions, the violation of which by the defendant would entail or justify a forfeiture of the or some of the rights granted by the Raker Act.

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 101. [319]

(h) The conclusion of law (in Paragraph IV of the Court's "Conclusions of Law") that in default of desisting from its disposal, in accordance with the agreement with the Company dated July 1, 1925, of the electric energy generated by it in connection with its Hetch Hetchy project, the defendant be enjoined and restrained from utilizing, for such disposal, the lands, rights and privileges granted to it, by the Raker Act for the purpose of generating electric energy.

The ruling involved in the drawing of said conclusion of law and the defendant's exception thereto are here designated as Ruling and Exception No. 102.

On June 28, 1938, and before the making, filing or entry of the Decree in said cause as hereinafter stated, the Court made an order, nunc pro tunc as of April 11, 1938, by which it denied defendant's motion for a dismissal of said cause made at the conclusion of the hearing as hereinbefore stated.

The defendant duly excepted to said order and to the ruling involved; said ruling and defendant's exception thereto being here designated as Ruling and Exception No. 103.

On June 28, 1938, the Decree in said cause was made, filed and entered therein. Said Decree is not incorporated in this Statement except by reference, because it appears elsewhere in the record herein. The defendant duly excepted to said Decree and to each and every of the provisions thereof. The ruling involved in said Decree and defendant's exception thereto are here designated as Ruling and Exception No. 104.

On July 8, 1938, within the time allowed by law and the rules of this Court, the defendant filed a Petition for a Rehearing of said cause, and, on the same day, the Court made and there was filed an order entertaining said Petition for Rehearing. Thereafter, on July 11, 1938, within the time allowed by law and the rules of this Court, [320] the plaintiff filed an Answer to said Petition for Rehearing. Said Petition for Rehearing was argued and submitted on July 26, 1938, and on the same date was denied by the Court, by its Order that day made. Neither said Petition for Rehearing nor

said Order entertaining it, nor plaintiff's Answer to it, nor the Order of Court denying it, are included herein, for the reason that they appear, elsewhere, in the record herein. The defendant duly excepted to the Court's order denying its said Petition for Rehearing. The ruling involved in said Order and Defendant's Exception thereto are here designated as Ruling and Exception 105.

STIPULATION AS TO CORRECTNESS OF STATEMENT OF EVIDENCE.

It is hereby stipulated by and between the parties hereto that the foregoing is a full, true and correct statement of all evidence offered or received and of all proceedings had and taken on the hearing of the above entitled cause, and that said statement may be approved by the above entitled Court or a Judge thereof without notice to either of the parties thereto.

Dated: November 7th, 1938.

FRANK J. HENNESSY,
W. E. LICKING,
Attorneys for Plaintiff.
JOHN J. O'TOOLE,
DION R. HOLM,
ROBERT M. SEARLS,
Attorneys for Defendant. [321]

APPROVAL OF STATEMENT OF EVIDENCE

It appearing that the foregoing Statement of Evidence in the above entitled cause is true and complete in all respects, and that it has been properly prepared, the same is hereby approved as a full, true and correct statement of the evidence in said cause.

Dated: December 20th, 1938.

MICHAEL J. ROCHE
United States District Judge

Receipt of a copy of the foregoing Statement of Evidence, Stipulation and Order is hereby admitted this 20th day of December 1938.

FRANK J. HENNESSY
W. E. LICKING
Attorneys for Plaintiff

[Endorsed]: Filed Dec. 20, 1938. [322]

[Title of District Court and Cause.]

ORDER DEFERRING CONSIDERATION OF SUSPENSION OF INJUNCTION

Whereas, the defendant in the above entitled proceeding has this day filed its petition for an order allowing an appeal from the judgment heretofore entered therein, and in said petition there is incorporated a prayer for the suspension of operation of the injunction granted by the judgment herein, pending the determination of said appeal; and

Whereas, in the opinion of this Court said application for suspension should be passed upon by the Honorable Michael J. Roche, District Judge, who tried the above entitled cause and entered the judgment therein; and [323]

Whereas, said Honorable Michael J. Roche is absent on vacation and will not return until after the statutory period allowed for said appeal will have passed;

Now, therefore, it is hereby ordered that consideration of the defendant's application for such suspension of injunction is hereby continued to the 7th day of November, 1938, and the Clerk of the Court is directed to place said matter on the calendar of Judge Roche's Department for hearing on said date.

Dated: October 17, 1938.

A. F. ST. SURE
District Judge

[Endorsed]: Filed Oct. 17, 1938. [324]

[Title of District Court and Cause.]

STIPULATION RESPECTING PROCEDURE TO GOVERN APPEAL

Whereas, the decree in the above entitled cause was made, filed and entered on June 28, 1938; and

Whereas, the defendant in said cause intends to appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the rules adopted by the Supreme Court of the United States, pursuant to the Act of June 19, 1934, Ch. 651 (hereinafter called the "new" rules) become effective September 17, 1938, in accordance with the provisions of Rule 86 thereof; and [325]

Whereas, it is uncertain whether (in the absence of this stipulation) said new rules would apply to or govern proceedings in connection with the appeal so to be taken by the defendant in said cause, from said decree, in view of the fact that said decree was entered prior to the effective date of said rules; and

Whereas, the defendant in said cause has already proceeded with the preparation of a statement of the case, assignment of errors and other papers for use on its said appeal, in compliance with the procedure required by the rules of procedure now in force which are applicable to appeals in equity causes (and hereinafter called the "old procedure") upon the assumption that said old procedure is applicable to and governs its said appeal; and

Whereas, it is believed by the parties hereto that the application of said new rules to the appeal so to be taken from the decree in said cause by said defendant, would not be feasible and will work injustice in view of the above mentioned circumstances.

Now, therefore, it is hereby stipulated and agreed by and between the respective parties hereto that the above entitled Court and said United States Cir-

cuit Court of Appeals for the Ninth Circuit, in accordance with Rule 86 of said rules adopted by the Supreme Court of the United States, and effective September 17, 1938, may each (without notice to either of the parties hereto) make an order providing that said rules effective September 17, 1938, shall not apply to or govern said appeal from said decree so to be taken by the defendant in said cause, or any matter connected with or relating to said appeal, but that the procedure now in force and governing appeals in equity causes shall apply to and shall govern [326] defendant's said appeal from said decree and all matters connected with or relating to said appeal.

Executed in Quadruplicate.

Dated: August 26th, 1938.

FRANK J. HENNESSY
W. E. LICKING
FREDERIC L. KURGIS
per F. J. H.
Attorneys for Plaintiff

JOHN J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant

[Endorsed]: Filed Aug. 26, 1938. [327]

[Title of District Court and Cause.]

ORDER RESPECTING PROCEDURE GOVERNING APPEAL

The parties hereto having this day filed herein a stipulation providing that the rules adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1938, Chapter 651, which become effective September 17, 1938, shall not be applicable to or govern the appeal to be taken by the defendant in the above entitled cause to the United States Circuit Court of Appeals of the Ninth Circuit from the decree made, filed and entered in said cause on June 28, 1938, but that the procedure now in force and governing appeals in equity causes shall apply to and govern said appeal, and all matters connected with or related to the same,

Now, therefore, for reasons stated in said stipulation

(1) It is the opinion of this Court that the application of said rules adopted by the Supreme Court of the United States and effective September 17, 1938, to the appeal from said decree so to be taken by the defendant in said cause, or to any matter connected with or related to said appeal, would not be feasible and would work injustice to the parties to said cause; and

(2) It is hereby ordered, in accordance with the provisions of Rule 86 of said rules effective September 17, 1938, that said last mentioned rules shall not apply to or govern said appeal from said decree so to be taken by the defendant in said cause, or to any

matter connected with or related to said appeal, but that the procedure now in force and governing appeals in equity causes shall apply to and shall govern said appeal and all matters connected with or related to the same.

Done in open court this 28th day of August, 1938.

MICHAEL J. ROCHE
United States District Judge

Approved as to form.

FRANK J. HENNESSY
U. S. Attorney

[Endorsed]: Filed Aug. 26, 1938.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the City and County of San Francisco, a Municipal Corporation, Defendant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the Final Decree in said cause which was made, filed and entered therein on June 28, 1938.

Dated: October 17th, 1938.

JOHN J. O'TOOLE
City Attorney
DION R. HOLM
Assistant City Attorney
ROBERT M. SEARLS

[Endorsed]: Filed Oct. 17, 1938. [328]

[Title of District Court and Cause.]

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Michael J. Roche, Judge of the Southern Division of the United States District Court for the Northern District of California:

The above defendant feeling aggrieved by the decree made and entered in this cause on June 28, 1938, by which the defendant was enjoined, among other things, from disposing of the electric energy, generated by it in connection with its Hetch Hetchy Project, pursuant to the terms of a contract between the defendant and Pacific Gas and Electric Company dated July 1, 1925, or in the manner provided in said contract, and from using, for the development and transmission of said electric energy, any of the lands, rights and [329] privileges granted to it by the Raker Act, if it fails to desist from disposing of said electric energy, in accordance with the terms of said contract of July 1, 1925, hereby

(1) appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and

(2) prays (a) that its said appeal be allowed; (b) that a citation to the plaintiff issue as provided by law; (c) that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, be sent to said United States

Circuit Court of Appeals; (d) that the proper order be made respecting the security to be required of it to perfect its said appeal, and (e) that, in connection with the allowance of its said appeal, the Court, as authorized by Equity Rule 74, make an order suspending, during the pendency of said appeal and until the final determination thereof, the injunction which, by its said decree, it directed to be issued.

Dated: October 17, 1938.

JOHN J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant

[Endorsed]: Filed Oct. 17, 1938. [330]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

City and County of San Francisco (a municipal corporation), defendant in the above entitled cause, filing herewith its petition praying that it be allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree of this Court in favor of the plaintiff in said cause and against it, which was made and entered herein on June 28th, 1938, now assigns the following, as errors made by the court in its rulings upon the hearing of said cause and in its Findings of Fact

and Conclusions of Law, made and filed in said cause and in its said decree therein, to-wit: [331]

Assignment No. 1:

That said Court erred in overruling the objection of the defendant to the admission in evidence of, and in admitting in evidence, "U. S. Exhibit No. 2", being an Ordinance passed by the Board of Supervisors of the City on December 12, 1913, approved by the Mayor of the City on January 13, 1914, and filed with the Secretary of the Interior of the United States on January 21, 1914, whereby the City accepted the grant made by the Raker Act upon the terms and conditions stated in said Act. The objection to the admission in evidence of said Ordinance was that it was irrelevant, incompetent and immaterial, and that said Board of Supervisors of the City and County of San Francisco had no power to restrict the City in the particular method of distribution of its electric power which it might employ, inasmuch as the determination of said matter rested entirely with the citizens of said City and County. Counsel for the defendant duly excepted to the ruling of the Court overruling said objection to said Ordinance and in admitting the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 1;

Assignment No. 2:

That said Court erred in overruling the objection of the defendant to the admission in evidence of,

and in admitting in evidence, "U. S. Exhibit No. 7", being a telegram dated March 13, 1935, from Harold L. Ickes, Secretary of the Interior, to Angelo J. Rossi, Mayor of the City and County of San Francisco, by which said Secretary of the Interior informed the Mayor that, in view of charges that the Raker Act was being violated by the City's arrangement with the Company, he had arranged for a hearing on the subject, in his office on May 6, 1935, at 2 o'clock P. M., and expressed the hope that the City would be represented at said hearing.

The objection to the admission of said telegram in evidence was that it was irrelevant, incompetent, and immaterial, and a mere self-serving declaration. Counsel for the defendant duly excepted to the ruling of the Court, overruling the objection to said telegram and admitting the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 2; [332]

Assignment No. 3:

That said Court erred in overruling the objection of the defendant to the admission in evidence of, and in admitting in evidence, "U. S. Exhibit No. 8," being a certified copy of a letter dated March 13, 1935, from Harold L. Ickes, Secretary of the Interior, to H. G. Cahill, Manager of Public Utilities of San Francisco, wherein Mr. Ickes informed Mr. Cahill that he approved the revised plans and specifications for the enlargement of the Hetch Hetchy Dam, but that a question having been raised as to

whether the provisions of the Raker Act were being violated by the existing arrangement with Pacific Gas & Electric Company, permission to proceed with the addition to the Hetch Hetchy Dam was not to be regarded as a direct or an implied approval of that arrangement, and, further, that an open hearing, on the question whether the Raker Act was being violated by said arrangement would be held in this office on May 6, 1935, at two o'clock P. M., at which he hoped the Commission would be represented. The objection to said Exhibit was that it was irrelevant, incompetent, and immaterial and self-serving; and that the defendant was not making any claim that the approval of the Secretary of the Interior to the enlargement of the Hetch Hetchy Dam, in accordance with plans and specifications heretofore submitted to him, was a waiver of any right of the plaintiff under the Raker Act. Counsel for the defendant duly excepted to the ruling of the Court overruling its objection to said letter, and admitting the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 3.

Assignment No. 4:

That said Court erred in overruling the objection of the defendant to the admission of, and in admitting in evidence, "U. S. Exhibit No. 9," being a certified copy of a telegram dated March 14, 1935, from [333] Angelo J. Rossi, Mayor of San Francisco, to Harold L. Ickes, Secretary of the Interior,

in which the Mayor acknowledged the receipt of Mr. Ickes's wire of the same date, noted the statement that charges had been "filed" claiming that the City was violating the Raker Act in the distribution of power, asked for copies of said charges, and stated that the City would be represented at the hearing of May 6th. The objection to said Exhibit was that it was incompetent, irrelevant and immaterial. Counsel for the defendant duly excepted to the ruling of the Court overruling its objection to said telegram and admitting the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 4.

Assignment No. 5:

That said Court erred in overruling the objection of the defendant to the admission of, and in admitting in evidence, "U. S. Exhibit No. 10", being a letter dated March 15, 1935, from Harold L. Ickes, Secretary of the Interior, to Angelo J. Rossi, Mayor of the City and County of San Francisco, in which Mr. Ickes acknowledged the Mayor's telegram of May 14th ("U. S. Exhibit No. 9") and stated that no formal charge had been filed to which the City must make specified response, but that communications had been received from various individuals contending that the arrangement between the City and the Company constituted a violation of the prohibitions of portions of Section 6 of the

Raker Act; and that said contention would be considered at the hearing of May 6th. The objection to said Exhibit was that it was incompetent, irrelevant, immaterial, and self-serving. Counsel for the defendant duly excepted to the ruling of the Court overruling said objection to said letter and admitting the same in evidence; said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 5. [333]

Assignment No. 6:

That said Court erred in overruling the objection of the defendant to the admission of, and in admitting in evidence, "U. S. Exhibit No. 11"; being a certified copy of an Opinion rendered by Harold L. Ickes, Secretary of the Interior, on August 24, 1935, expressing the view that the contract of July 1, 1925, between the City and the Company constituted a violation of Section 6 of the Raker Act. The objection to said Exhibit was that it was incompetent, irrelevant, and self-serving. Counsel for the defendant duly excepted to the ruling of the Court, overruling the objection to said Opinion and admitting the same in evidence, said ruling and the defendant's exception thereto being designated in the record as Ruling and Exception No. 6.

Assignment No. 7:

That said Court erred in overruling the objection of the defendant to the admission of, and in admitting in evidence, without limitation, "U. S. Exhibit No. 14", being a certified copy of a letter

dated April 2, 1935, from the Secretary of the Interior to the Attorney General of the United States, requesting the commencement of the present suit. The objection to said Exhibit was that it was irrelevant, incompetent, immaterial, and self-serving, and that if admitted in evidence at all, it should be limited to the sole purpose of showing that the Secretary of the Interior had requested the Attorney General to commence the present suit. Counsel for the defendant duly excepted to the ruling of the Court, overruling said objection to said letter, and in admitting the same in evidence, and in declining to limit the effect thereof, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 7. [335]

Assignment No. 8:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question to R. B. Hansen, a witness for the defendant, who had previously testified that the City had regularly paid to the Government the annual payments required to be made by Section 7 of the Raker Act, by remitting said sums to the Secretary of the Interior, who had retained them and that the total amount so paid, including payments for the year 1937, was $330,000.00, viz.:

Q. I ask you whether you have capitalized what the payments of this semi-annually to the Government will mean to the City and County of San Francisco?

The objection to said question was that it was incompetent, irrelevant and immaterial, and had no bearing on the issues in the case.

Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection, said ruling and the defendant's exception thereto being designated in the record as Ruling and Exception No. 8.

Assignment No. 9:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question put to Mr. John J. Daily, a witness for the defendant, who had previously testified that, in June 1925, he, Mr. Nelson Eckhart, one of the Engineers of San Francisco, and Mr. Robert M. Searls, then Assisfant City Attorney of San Francisco, had had several conversations with Mr. John H. Edwards, who, at that time, was either Assistant Secretary of the Interior or Solicitor of the Department of the Interior, and in the conversations was acting on behalf of the Secretary of the Interior who had referred the matter to him, viz.:

Q. Now, will you state the substance of the conversation? [336]

The objection to said question was that it called for hearsay, that the conversation was not with a party to the cause or with anybody authorized to bind any party to the cause, that the proper foundation had not been laid, in that the identification of the party with whom the conversation was had had

not been established, nor the time of the conversation established with any particular definiteness. Cofinsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said question, said ruling and the defendant's exception thereto being designated in the record as Ruling and Exception No. 9.

Assignment No. 10:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question put to Mr. John J. Dailey, a witness for the defendant, with respect to the contract of July 1, 1925, between the City and the Company, viz.:

> Q. Mr. Dailey, in the preparation of the contract between the City and County of San Francisco and the Pacific Gas and Electric Company as to the distribution of the Hetch Hetchy power, did you rely upon the ruling of the Solicitor of the Department of the Interior relative to the validity of an agency contract?

The objection to said question was that it was immaterial what Mr. Dailey relied on or what anybody else relied on, and that such matter had no bearing upon the question before the Court as to what the contract actually is. Counsel for the defendant duly excepted to said ruling of the Court sustaining said objection to said question, its ruling and the defendant's exception thereto being designated in the record as Ruling and Exception No. 10.

Assignment No. 11:

That said Court erred in sustaining an objection by counsel for the [337] plaintiff to the admission in evidence of, and in refusing to admit in evidence "Defendant's Exhibit E" for identification, being a letter dated July 20, 1925, signed by C. Edward Wright, Solicitor of the Department of the Interior, addressed to the Honorable Secretary of the Interior, to which was attached a copy of the agreement of July 1, 1925, between the City and the Company ("U. S. Exhibit No. 6") and in which the writer expressed the view that the agreement of July 1, 1925, was an agency agreement and not an agreement for sale and resale of the electric energy which was the subject matter thereof. The objection to said Exhibit was that it was not a communication which was ever communicated to the defendant, and that from its date (July 20th, 1925) it obviously appeared to be a mere statement of the views of the Acting Solicitor, which were subsequently expressed in the letter of August 19, 1925, from the Secretary of the Interior to the Mayor of San Francisco, in which the Secretary stated that the acts of the City should determine whether or not it was living up to the terms of the Raker Act, a matter on which he refused to express any opinion; further, that the letter was incompetent and irrelevant, and was never proffered to or acted upon by the defendant, and that there could never have been any reliance by the defendant upon it. In connection with the offer of said Exhibit and the objection thereto, counsel for the

defendant stated that the Exhibit was offered, among other things, as a contemporaneous construction of the agreement of July 1, 1925 ("U. S. Exhibit No. 6"). Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said Exhibit, said ruling and the defendant's exception thereto being designated in the record as Ruling and Exception No. 11.

Assignment No. 12:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in [338] evidence "Defendant's Exhibit G" for identification, consisting of a statement dated October 18, 1937, signed by the Registrar of Voters of the City and County of San Francisco, and showing the number of bond issues that have been proposed to the voters of the City for the Hetch Hetchy project, as well as the revenue bonds by which extensions could have been built, and proposed charter amendments relating to the same subject, and seven pamphlets respecting the matter, dated November 8, 1927, November 5, 1928, August 26, 1930, November 8, 1932, November 7, 1933, May 2, 1935 and March 9, 1937. The objection of counsel for the plaintiff to said Exhibit was that neither the evidence embodied therein as a whole, nor any of the items thereof singly, constituted matter that was either material or relevant to prove or disprove any allegation in the complaint or in the answer. Counsel for the

defendant duly excepted to the ruling of the Court sustaining said objection to said exhibit and refusing to receive the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 12.

Assignment No. 13:

That said Court erred in sustaining the objection of counsel for plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit H" for identification, being a statement showing the assessment roll, constitutional debt limitation, bonded debt subject to such limitation, and the leeway for new debts of the City for the years 1924-1925 to date, as shown by the records of the City's Controller, and the leeway the City has had for each of said years, in the bonded debt, by which it might acquire a publicly owned distribution system. The objection to said exhibit was, that whether the City was or had been in a position to acquire a publicly owned distribution system, or whether it should do so was not in issue, and that the matters shown by the [339] Exhibit were incompetent, irrelevant and immaterial. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said Exhibit and refusing to receive the same in evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 13.

Assignment No. 14:

That said Court erred in sustaining the objection of counsel for plaintiff to the admission of, and in refusing to admit in evidence, "Defendant's Exhibit I" for identification, being a photostatic copy of Resolution 23723 (New Series) of the Board of Supervisors of the City, by which the City (prior to the execution of the contract of July 1, 1925) solicited offers by any municipality, municipal water system, or irrigation district, for the purchase of the whole or part of electric energy generated by the City in connection with its Hetch Hetchy project, delivery thereof to be made at any point on the Hetch Hetchy transmission line at the voltage and frequency mentioned in the preamble to the resolution. The objection to said Exhibit was that the matters shown thereby were incompetent, irrelevant, and immaterial, and not within the issues in the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said Exhibit and refusing to receive the same in evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 14.

Assignment No. 15:

That said Court erred in sustaining the objection of counsel for plaintiff to the admission in evidence of, and in refusing to admit in evidence "Defendant's Exhibit J" for identification, being

a certified copy of Resolution No. 31398 (New Series), of the Board of Super- [340] visors of the City and County of San Francisco, by which the City Engineer was directed to ascertain from the power companies operating in San Francisco, the terms upon which the total output in electrical energy from the Hetch Hetchy project could be marketed through an agency agreement, and the price at which each corporation would grant an option to the City to buy its distribution system and standby plants, and whether said corporation would be willing to sell its distribution system and standby plant to the City on a pay-as-you-go plan. In response to a request of the Court so to do, counsel for the defendant stated that the purpose of said offer was to show an attempt by the City to effect the distribution of its electric energy upon terms that would be most favorable to the City, by the acquisition of a publicly owned plant by purchase from the corporation which owned it. The objection to said Exhibit was that the matters shown thereby were irrelevant, incompetent and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said Exhibit and refusing to receive the same in evidence, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 15.

Assignment No. 16:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit K" for identification, being the correspondence between the City and Pacific Gas and Electric Company and Great Western Power Company with respect to the City's solicitation of offers from said power companies pursuant to and as called for by the aforesaid Resolution ("Defendant's Exhibit J" for identification). The objection to said Exhibit was that the matters shown thereby were incompetent, irrelevant and immaterial and not within the issues of [341] the case. Counsel for the defendant duly excepted to said ruling of the Court sustaining said objection to said Exhibit and refusing to receive the same in evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 16.

Assignment No. 17:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit L", for identification, being a certified copy of Resolution No. 21,178 (New Series), of the Board of Supervisors of the City and County of San Francisco, declaring that the City, notwithstanding its contract of July 1, 1925, with the Company, would always stand ready to serve the Modesto and Turlock Irrigation Districts

in the event said irrigation districts elected to avail themselves of the privilege of purchasing electric power from the City under the terms of the Raker Act. In connection with the offer of said Resolution, counsel for the defendant, in reply to a question from the Court inquiring the purpose of the offer, stated that Modesto Irrigation District, in response to the solicitation contained in "Defendant's Exhibit I" for identification, had replied that it might require standby service some day, and that the contract of July 1, 1925 ("U. S. Exhibit No. 6") contains a proviso that if the City is ever required to furnish power to said Irrigation District, the amount required therefor may be excepted from the contract. The objection to said Exhibit was that the matters shown thereby were incompetent, irrelevant, and immaterial, and not within the issues of the case, and, further, that said Resolution was a mere declaration of policy on the part of the City. Counsel for the defendant duly excepted to said ruling of the Court sustaining said objection to said Exhibit and refusing to accept the same in [342] evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 17.

Assignment No. 18:

That said Court erred in sustaining the objection of counsel for the plaintiff to the question (with reference to the delivery of electric energy by the City to the Company under the agreement of July

1, 1925), put to Mr. Paul J. Ost, a witness for the defendant, as follows:

> Q. How does the Hetch Hetchy load as delivered under this contract, compare with the total demand in San Francisco?

in connection with which question counsel for the defendant offered to prove by said witness that the amount of energy delivered under the agreement is less than the demand in San Francisco, and that if the agreement were terminated, (and the Hetch Hetchy electric energy thereby made unavailable for distribution), there would be insufficient electric energy available for the service of consumers in San Francisco, unless and until the Company, or some other distributing company, should construct new hydro-electric generating plants and steam generating plants and standby service. In connection with said question and the offer of proof which accompanied it, counsel for the defendant stated that he believed it to be important to show a public interest in the matter which a Court of Equity should consider in determining whether or not equitable relief should be accorded, and that the offer of proof was made upon the theory that the Court should not award injunctive relief, unless no other remedy were available, where a great detriment would result to a large number of the public. The objection to said question, and to the offer of proof made in connection therewith, was that said question and the matters embraced within

said offer, were incompetent, irrelevant and immaterial. Counsel for the defendant duly [343] excepted to the ruling of the Court sustaining said objection and rejecting said offer of proof, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 18.

Assignment No. 19:

That said Court erred in sustaining the objection of counsel for the plaintiff to a formal offer made by counsel for the defendant to prove by the witness Paul J. Ost (and in refusing to receive evidence of, the matters so formally offered to be proved by said witness) that if the amount of energy generated and delivered into San Francisco through the medium of the contract of July 1, 1925 ("U. S. Exhibit No. 6"), whether it be the identical kilowatts or an equivalent amount were, through a termination of said contract, subtracted from the total amount of energy delivered to San Francisco from all sources, such a shortage in the available power supply to the Northern part of the State of California, would be caused thereby, as would require the construction of additional power plants or additional facilities for bringing in power and would thus endanger the supply for public consumption. The objection of the plaintiff to said offer of proof and to the matters sought to be shown thereby, was that said matters were incompetent, irrelevant, immaterial, hypothetical and

based upon facts not in evidence in the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection and refusing to receive said evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 19.

Assignment No. 20:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question put to Mr. Paul J. Ost, a witness for the defendant: [344]

> Q. What was your estimate of the cost of the city's constructing a transmission, stand-by, and distribution system adequate to supply the Hetch Hetchy energy to its people and to furnish the necessary stand-by and supplemental system?

The objection to said question was that it was incompetent, irrelevant, and immaterial, and that the only point in the case was that the City had not fulfilled its obligations under the Raker Act. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said question, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 20.

Assignment No. 21:

That said Court erred in sustaining the objection of counsel for the plaintiff to a formal offer of proof

made by counsel for the defendant to prove (and in refusing to receive evidence of the facts so offered to be proved) that it would cost in excess of $60,000,000.00 for the City to build and install its own transmission, step-down, distribution, and standby service and in refusing to receive evidence of said facts. The objection to said offer and to said evidence was that they were incompetent, irrelevant and immaterial and not within the issues of the case. Counsel for the defendant duly excepted to said ruling of the Court rejecting said offer of proof and refusing to receive said evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 21.

Assignment No. 22:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question, put to Mr. Paul J. Ost, a witness for the defendant:

[345]

Q. What would be the cost of a necessary stand-by system plant for San Francisco if the City were to transmit and distribute only the energy produced at the Moccasin plant without reference to any steam supplemental plant?

The objection to said question was that it was incompetent, irrelevant, and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court, sustaining said objection to said question, said ruling and the

defendant's exception thereto being designated in the record herein as Ruling and Exception No. 22.

Assignment No. 23:

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question put to Mr. Paul J. Ost, a witness for the defendant:

> Q. At what period of time was it definitely determined to pierce the Coast Range Mountains by tunnel and bring the water into the City and County of San Francisco by gravity head instead of pumping it over the Coast Range?

Counsel for the defendant stated that said question was asked to show that a change in the conditions existing when the Raker Act was enacted had occurred; that, at the time of the enactment of the Act, it had been the plan of the City to pump the water over the Coast Range Mountains and to use the power generated in the Hetch Hetchy project for that purpose, but that later, various core borings and test shafts proved that it was possible to penetrate that particular formation with tunnels, and it was then decided that the water should be drawn to San Francisco by gravity by tunnels through the Coast Range Mountains.

Further, in response to a question from the Court, counsel for the defendant stated that the change in plan was made long prior to 1925, [346] but sub-

sequent to the enactment of the Raker Act, and that, as a result of the change, the surplus power available for distribution in San Francisco was enormously greater than was contemplated at the time the Act was passed; that, in his opinion, the question was justified by the cases which hold that evidence is admissible to show a change in conditions occurring after the making of a grant containing covenants restricting the utilization of the granted property. The objections to said question and to the offer of proof in connection therewith was that the facts sought to be shown were incompetent, irrelevant and immaterial, and not within the issues in the case and would merely tend to show that it was more convenient for San Francisco to change its plan and sell the power generated in connection with the Hetch Hetchy project than to conform to the Raker Act.

Counsel for the defendant duly excepted to the ruling of the Court sustaining the objection to said question and rejecting the offer of proof made in connection therewith, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 23.

Assignment No. 24.

That said court erred in sustaining the objection of counsel for the plaintiff to a formal offer by counsel for the defendant, to prove (and in refusing to receive evidence of the facts so offered to be proved) that, at the time the Hetch Hetchy grant was made,

and for many years prior thereto, it had been the plan of the Engineering Department of the City and County of San Francisco to pump Hetch Hetchy water over the Coast Range Mountains and, in so doing, to utilize the greater part of electric energy which might be developed in that project; that some three years after the enactment of the Raker Act, it was ascertained, through the drilling of core holes and the sinking of test shafts that [347] it would be physically possible and practical to tunnel the Coast Range Mountains, and that, when that fact was ascertained, it was determined to tunnel the range and to bring the water to San Francisco by gravity, and that, as a result of the change in plan, an enormously greater amount of electric energy was made available for disposition by the City than was contemplated at the time the Raker Act was passed. In connection with said offer of proof, counsel for the plaintiff stated that the state of facts before Congress at the time of the enactment of the Raker Act was later changed; that the facts offered to be proved would show, first, the state of facts as they existed at the time the Raker Act was passed, and would assist the Court in interpreting the language of Section 6 of the Raker Act and in determining the intention of Congress in using that language, and would show, second, the changed conditions occurring subsequent to the enactment of the Raker Act, which should affect the relief which the Court might grant. The objection to said offer

of proof and to the facts sought to be proved, was that they were incompetent, irrelevant, immaterial, and not within the issues of the case, and that the fact that the City had changed its plans after the enactment of the Raker Act was not material at all on the question of whether or not, in the sale of power, it was violating Section 6 of the Raker Act. Counsel for the defendant duly excepted to the ruling of the Court rejecting said offer of proof and refusing to receive the evidence contemplated thereby, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 24.

Assignment No. 25,

That said Court erred in sustaining the objection of counsel for the plaintiff to the following question put to Mr. N. Randall Ellis, a witness for the defendant, with respect to the figure 73.3% (which, [348] he had previously testified, was the percentage of the total moneys collected by the Company from consumers in San Francisco for electric energy, which is allocated to the Company under the agreement of July 1, 1925 ["U. S. Exhibit No. 6"] to cover general administration expenses, distribution cost, stand-by and peak load expense and transmission expense):

Q. In your opinion, at that time did that figure represent the actual expense of the Pacific Gas & Electric Company in distributing electrical energy, received by it at Newark, to

consumers in San Francisco, including a reasonable return on the capital required for that purpose?

A. Yes.

The objection to said question was that it was incompetent, irrelevant and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection to said question, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 25.

Assignment No. 26:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, Decision No. 22147 of the Railroad Commission of California, entitled: "In the Matter of the Application of the City and County of San Francisco, a municipal corporation, that the Railroad Commission of California Fix and Determine the Just Compensation to be paid by the City and County of San Francisco", etc., and to application No. 9767, in response to which said Decision was rendered, by which application said Railroad Commission was requested to fix and determine the just compensation to be paid by the City for certain parts and portions of the electric generating transmission and distribution properties of Great West-

ern Power Company. In connection with the offer of [349] said Decision and Application, counsel for the defendant offered to prove thereby that, in the rate proceedings of said Great Western Power Company, which were instituted on February 11, 1924, the value of the properties of said Company was fixed by said Railroad Commission at the sum of $11,815,000.00; that in the year 1930 a bond issue was submitted to the people of San Francisco to purchase the properties of said Great Western Power Company at $18,945,000.00, and counsel for the defendant further stated that he would explain by the witness the discrepancy between said latter amount and the amount of $11,815,000.00 fixed by the Railroad Commission as the value of said properties. Counsel for the defendant further stated, in connection with said offer, that the evidence was offered to show that the City officially did everything within its power to comply with and fulfill the terms of the Raker Act. The objection to said Decision and Application and the offer of proof made in connection with them was that the evidence was not admissible under any theory; was incompetent, irrelevant and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection and declining to receive said Application and Decision in evidence, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 26.

Assignment No. 27:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, Decision 21248 of the Railroad Commission of the State of California, entitled: "In the Matter of the Application of the City and County of San Francisco, a municipal corporation, that the Railroad Commission of the State of California Fix and Determine the Just Compensation to be paid by the City and County of San Francisco for certain [350] parts and portions of the electric generating, transmission and distribution properties of the Pacific Gas & Electric Company, a corporation", which Decision and the Decision (No. 22147) previously referred to, are found in Vol. 33 of the Opinions and Orders of the Railroad Commission of California. In connection with the offer of said Decision (No. 21248) counsel for the defendant offered to prove that it fixed the value of the properties of Pacific Gas & Electric Company as of June, 1929, at $26,880,000.00; that "Defendant's Exhibit G" for identification, previously offered, shows that on August 26, 1930, a bond issue was submitted to the people of the City for the purpose of acquiring certain properties of said Pacific Gas & Electric Company for the sum of $44,600,000.00, and defendant's counsel stated that he desired the witness to explain the difference between said last mentioned figure and the figure of $26,880,000.00, fixed by said Decision of the Railroad Commission,

as the value of the properties of said Pacific Gas & Electric Company. The objection of counsel for the plaintiff to said Decision and to the offer of proof made in connection therewith, was that the facts shown to be proved were incompetent, irrelevant and immaterial, and not within the issues of the case, and further that the Court had previously ruled that evidence with respect to the bond issues was not admissible. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection, and refusing to receive in evidence said Decision and the matters sought to be proved in connection therewith, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 27.

Assignment No. 28:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence "Defendant's Exhibit O" for identification, being a [351] statement prepared by Mr. William H. Nanry, a witness for the defendant, showing the bonds which had been authorized and sold by the City and County of San Francisco for governmental purposes between 1924-5 and 1937, and showing the changes in the City's bonding capacity resulting therefrom, and the legal impossibility of the City to vote bonds sufficient to cover the cost of a municipally owned distribution system. The objection to said Exhibit was that the facts shown thereby

were incompetent, irrelevant and immaterial, and that the financial ability of San Francisco to comply with the provisions of the Raker Act was no justification for the sale of power contrary to the terms of Section 6 of said Act. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 28.

Assignment No. 29:

That said Court erred in sustaining the objection of counsel for the plaintiff to a formal offer made by counsel for the defendant to prove by the witness William H. Nanry (and in refusing to receive evidence of the facts so offered to be proved) that, during the period June 1929 to 1937, particularly because of the depression, the burden cast upon the bonded debt leeway of San Francisco, through the operation of the law limiting bonded indebtedness, had been greatly increased, and the leeway diminished, because of the necessity of providing a large sum of money for relief and large sums of money for sewers, schools, streets, and other purposes which, in normal times, would be taken care of through the annual tax levy, but, which, by reason of the severe depression, had to be capitalized in order that the services mentioned could be rendered, and the relief afforded, to the people of San Francisco. The objection of counsel for the plaintiff to the facts so [352] sought to be proved was

that they were incompetent, irrelevant, and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection and refusing to receive evidence of said facts, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 29.

Assignment No. 30:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit P" for identification, being a certified copy of a record of water appropriations made by San Francisco, and other persons on behalf of San Francisco who have assigned those rights to San Francisco, and showing particularly the various water rights which the City had acquired on the Tuolumne River, Lake Eleanor and Cherry River and the tributaries of both rivers and the lake. In connection with said offer counsel for the defendant stated that the Exhibit would show that the water rights used by the City in the development of electric energy involved in this suit were acquired and owned by the City under and by virtue of the laws of the State of California, and were not acquired through any grant from the Federal Government. The objection to said Exhibit and to the facts sought to be shown thereby was that it and they were incompetent, irrelevant and

immaterial, and not within the issues of the case, and that the Court was not concerned with the identity of the owner of the water rights. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection and refusing to receive in evidence said Exhibit and the facts sought to be proved thereby, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 30. [353]

Assignment No. 31:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit P" for identification, being a record of the water rights used by the City on the Hetch Hetchy project, in connection with which counsel for the defendant stated that said Exhibit would show that the water used for the development of the Hetch Hetchy electric power which was being distributed by the Company under the provisions of the contract of July 1, 1925, as being developed through the exercise of water rights owned by the City, and not acquired from the United States. The objection to said Exhibit and to the facts sought to be shown thereby was that it and they were incompetent, irrelevant and immaterial, and not within the issues of the case, and that the ownership or non-ownership of said water rights by the City was not involved in the case. Counsel for the defendant duly excepted

to the ruling of the Court sustaining said objection and in refusing to receive in evidence said Exhibit and the facts sought to be proved thereby, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 31.

Assignment No. 32:

That said Court erred in sustaining the objection of counsel for the plaintiff to the admission in evidence of, and in refusing to admit in evidence, "Defendant's Exhibit Q" for identification, being a record of assignments made to the City by various appropriators of the water rights which are mentioned in "Defendant's Exhibit P" for identification. The objection of the counsel for plaintiff to said evidence and said offer was that it was incompetent, irrelevant and immaterial, and not within the issues of the case. Counsel for the defendant duly excepted to the ruling of the Court sustaining said objection and re- [354] fusing to receive in evidence said Exhibit and the facts shown thereby, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 32.

Assignment No. 33:

That said Court erred in granting the motion of counsel for the plaintiff to strike out various portions of the evidence previously admitted by the Court, subject to a motion to strike out, which motion was granted by order of the Court made April

11, 1938. The portions of the evidence so stricken out by said order were the following:

(a) The following testimony of Joseph James Phillips, a witness for the defendant:

Q. What was the value of those parcels (referring to the parcels of land conveyed by the United States to the defendant pursuant to the terms of the Raker Act)?

A. $244,139.45.

Q. Do you know the total acreage and the value (of the lands conveyed by the defendant to the United States)?

A. The acreage was 1698.36 and the value $74,409.00.

Q. As purchasing agent for the project, and acquiring it, did you acquire any water rights from the United States Government?

A. No.

Q. Are you familiar with the so-called Ham Hall purchase made by the City and County of San Francisco?

A. Yes.

Q. How was it made?

A. $1,052,000.

Q. That includes the water rights and the lands, does it, Mr. Phillips?

A. Water rights and lands and development work, buildings, and various other items.

Q. Where is it located, for the information of the Court?

A. Cherry and Lake Eleanor.

Q. Indicate it on Exhibit A for the information of his Honor.

A. There are three watersheds involved in the Hetch Hetchy project. One is named Hetch Hetchy Valley, and the other two in the watershed are Lake Eleanor and the watershed of Cherry River. Ham Hall purchased the land, buildings, development work, surveying and other work in these watersheds of Lake Eleanor and Cherry.

Q. Have you stated all the value of the lands that were obtained from the Government on this project?

A. Yes.

Q. Repeat them, please.

A. $244,139.45.

Q. Have you the figures of what it cost the City and County of San Francisco to purchase the area that is indicated in red at the Moccasin Power Plant on Defendant's Exhibit A?

A. I have not the itemized figures here of the various properties. What I have is my valuation of real property owned by the City and County of San Francisco which under the charter it is my duty to prepare every year.

Q. You mean in connection with this project?

A. All properties owned by the City, and in this book is everything in connection with the Hetch Hetchy project.

Q. Would you kindly relate what the properties are that are used in connection with the Hetch Hetchy project, and their value?

A. I have before me a report showing—do you want the property as well as the price?

Q. Yes, I certainly do.

A. Tuolumne County there is a reservoir land, rights of way, reservoir land, aqueduct, power plant, regulating reservoir, rights of way, electric transmission lines and rights of way, Hetch Hetchy railroad land and rights of way. In further toward the city I have railroad land, aqueduct and electric transmission line, with a total of $2,372,514. Those are the actual figures taken from the deeds.

Q. That likewise, is the amount of money that the City and County of San Francisco paid for aqueduct, tunnels rights of way parcels of land that were required to be acquired in fee, and, in short, the entire value of the real property involved or the easements in the Hetch Hetchy project?

A. Yes.

(b) The following testimony of R. B. Hansen, a witness for the defendant: [355]

Q. Referring to Section 9(p) of the Raker Act, that the grantee shall construct a trail on the north side of the Hetch Hetchy reservoir site, and leading from said trail to the Tiltill Valley and to Lake Vernon, and a road or trail to Lake Eleanor and Cherry Valley via McGill

Meadow, do you know the amount of money that the City and County of San Francisco expended, if any, in the carrying out of the obligations under that section of the Act?

A. I have taken from our office records the actual cost to the city of those trails as $82,670.04.

Q. In addition to that, in lieu of the building of the trails on the north side of the valley, and constructing the road from Hetch Hetchy to all those valleys were certain amounts paid to the United States Government and accepted by the Secretary of the Interior in or about the year 1930?

A. They were. There were five payments made by the City and County of San Francisco to the United States Government, a payment of $250,000 in each of the five years, 1932 to 1936, inclusive. This gives a total of $1,250,000.

Q. The program to which you have testified which cost $1,250,000 was the program which was subsequently approved by the Board of Supervisors and followed out, was it not?

A. Yes.

Q. Now, in addition to this expenditure, did the city expend any money in the grading and construction of the present highway leading from Mather in to the Hetch Hetchy Valley, a distance of 19 miles, I think?

A. The city paid for the entire cost of this road, the total cost to the city being $353,500.91.

Q. Has that road been conveyed to the United States Government?

A. Yes, it is being used by the public.

Q. Did the City construct a road, a wagon road, from Hetch Hetchy Lake to Lake Eleanor?

A. The City constructed a wagon road leading from Hetch Hetchy Reservoir to Lake Eleanor, at the cost of about $75,000.

Q. Is that road available for public use under safety restrictions?

A. Yes.

Q. Did the City also reimburse the Tuolumne Water Supply Company for sums expended by that company from 1902 to 1911 in constructing roads and trails to the Stanislaus National Forest which have later been made available to the Government and the public?

A. The City reimbursed the Tuolumne Water Supply Company to the extent of $85,000, covering work on roads [356] and trails that had already been done by this company during the period from 1902 to 1911.

Q. What was the total of the figures which you have given as to the roads and trails constructed by the City and County of San Francisco in the National Park, or for which money was furnished either to the Government or to its predecessor in interest when the trails were later turned over to the Government?

A. This total expenditure adds up to be $1,846,170.95.

Q. Under the provisions of Section 9(t) of the Raker Act, the grantee is required to convey to the United States a good and sufficient title to any and all tracts of land which are now owned and not actually required for use under the provisions of this Act. Did the City expend any money in order to comply with the terms of that provision of the Act?

A. The city returned to the Government 1698.36 acres which they had bought from private parties previously.

Q. Have you the values at which these lands have been appraised, or are they combined with the purchase of water rights and other things?

A. We have appraised those at approximately $100 an acre, which gives an appraised value of $169,836.

Q. Under the terms of Section 7 of the Raker Act the City and County of San Francisco is required to pay annually to the United States sums commencing with $15,000 and at the end of ten years running up to $30,000. Have those payments been regularly made by the City?

A. They have been regularly made by the city to the United States Government.

Q. And accepted by the United States Government?

A. Yes.

Q. Those sums are remitted to the Secretary of the Interior, are they not?

A. Yes.

Q. What is the total of those sums to date including the year 1937?

A. The total including the year 1937 is $330,000.

Q. Have you apportioned the proper overhead expense of engineering and administration relating to the maintenance of trails and roads, not included in the above estimate? I am referring now only to roads and trails which are conveyed to the Government or made subject to the Government's use.

A. Yes. The cost of engineering and administra- [357] tion and overhead expense and maintenance of roads and trails has been estimated at 10 per cent.

Q. If you add those last figures to your total paid originally for the roads and trails you get a grand total of $2,702,607, do you not?

A. Yes, that is correct.

(c) A letter dated May 18, 1928, from Hubert Work, Secretary of the Interior, to the City and County of San Francisco, previously admitted in evidence and marked "Defendant's Exhibit C".

(d) The following testimony of Willis O'Brien, a witness for the defendant:

Q. What was the total amount of the bond issue voted for this project?

A. $89,600,000.

Q. In the exhibit referred to (i.e., "Defendant's Exhibit F") it is set out year by year as to when the bonds were voted, the rates of interest, and what else does it show, briefly?

A. As to the years that they were voted, that is not shown, but the date of the bonds are shown, for example, the bonds of the 1909 issue, January 1, 1910 issue July 1. The elections authorizing these, of course, were held some time before.

Q. It also shows, does it, what the bonded debt limit of San Francisco was on July 1, 1925?

A. It does.

Q. What is that, in your Exhibit?

A. The limit for future issues after sale of all currently authorized bonds was $12,732,588.

Q. Directing your attention to the last page of this exhibit, just explain to his Honor what that page purports to show.

A. You have reference to the bond interest?

Q. Yes.

A. That schedule shows the total bond interest to June 30, 1937 with the detail there as to the issues.

Q. What is the total interest that has been paid?

A. The grand total of interest is $41,021,874.01. [358]

(e) A three-page document dated July 1, 1925, entitled "Bonded Debt Limit", prepared by the

witness Willis O'Brien, and countersigned by Harold J. Boyd, Controller of the City and County of San Francisco, showing the Bonded Debt Limit of said City and County; this document had previously been admitted in evidence and marked "Defendant's Exhibit F".

(f) The following testimony of William H. Nanry, a witness for the defendant:

Q. Mr. Nanry, assuming that the income from the hydro-electric energy marketed through the contract in question has averaged something in excess of $2,200,000 annually per year, can you state what the net effect upon the taxpayers of San Francisco would be if there was a cancellation of this contract and that income were cut off?

A. If that income would not be available from the agency agreement it would have to be made up by taxation and would require an increase of about 28 cents in the tax rate.

Q. 25 cents per hundred dollars?

A. Per hundred dollars of assessed valuation.

Q. Is that statement based upon the present assessment roll of San Francisco?

A. Current assessment roll of the City.

Counsel for the defendant duly excepted to the ruling of the Court striking out the above mentioned portions of the evidence in said cause, said ruling and the defendant's exception thereto being desig-

nated in the record herein as Ruling and Exception No. 33.

Assignment No. 34:

That said Court erred in its Order made April 11, 1938, by which it denied the motion of counsel for defendant (made prior to the conclusion of the hearing of said cause), to reopen said cause and to receive the evidence theretofore offered by said defendant upon the trial of said cause, to which the Court had theretofore sustained ob- [359] jections of counsel for the plaintiff. Counsel for the defendant duly excepted to the ruling of said Court embodied in said last mentioned Order, said ruling and the defendant's exception thereto being designated in the record herein as Ruling and Exception No. 34.

Assignment No. 35:

That said Court erred in refusing to grant the motion of counsel for the defendant to require the plaintiff to and in failing to require counsel for the plaintiff to specify seriatim and severally (a) the provisions in the contract of July 1, 1925, made by The City and County of San Francisco with the Pacific Gas and Electric Company for the distribution of municipal electric energy ("Exhibit A" to the Answer of the Defendant filed herein July 20, 1937, and United States "Exhibit 6" at the Final Hearing), upon which the Plaintiff relies to establish that said contract is not an agency contract, but a contract of sale, and to specify (b) which of those

provisions the Plaintiff claims (1) show or tend to show that the parties to said contract did not intend to make an agency contract but a contract of sale, or (2) although not showing or tending to show an intention of the parties to make a contract of sale, but rather to make one of agency, nevertheless (regardless of the intention of the parties), (a) are legally inconsistent with the idea of an agency; (b) make it impossible, as matter of law, for the contract to be one of agency, and/or (c) convert, by operation of law, what was or may have been intended as a contract of agency into a contract of sale.

Counsel for the defendant duly excepted to the ruling of the Court denying its said motion, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 35. [360]

Assignment No. 36:

That said Court erred in refusing to grant the motion of counsel for defendant that in its decision it deal specifically with, and in failing, in its decision, to deal specifically with, each of the said contentions of and as made by the plaintiff aforesaid, and declare which of the said contentions, in the judgment of the Court, are sound and which are unsound; and in and by its said decision, and in advance of any findings of fact to be made herein, furthermore, and independently of said contentions, specify severally the provisions in the aforesaid

contract, if any there be, which, in the opinion of the Court, (a) establish or tend to establish that said contract is not an agency contract, but a contract of sale, (b) show or tend to show that the parties to the contract did not intend to make any agency contract, but intended to make a contract of sale, (c) although not showing or tending to show an intention of the parties to make a contract of sale, but rather to make one of agency, nevertheless (regardless of the intention of the parties) (1) are legally inconsistent with the idea of an agency; (2) make it impossible, as matter of law, for the contract to be one of agency and/or (3) convert, by operation of law, what was or may have been intended as a contract of agency into a contract of sale.

Counsel for the defendant duly excepted to the ruling of the Court refusing to grant the motion last specified, and in failing in its decision to deal specifically with the matters mentioned in said motion, said ruling and the defendant's exception thereto, being designated in the record herein as Ruling and Exception No. 36.

Assignment No. 37:

That said Court erred in its ruling by which it denied, and refused to find in accordance with the request contained in paragraph Numbered 3 of defendant's proposed amendments to Plaintiff's proposed "Findings [361] of Fact and Conclusions

of Law" in said cause, which said request read as follows:

"3. On page 3, line 7 of said proposed Findings, after the word 'generated', insert the following:

'The location and extent of the lands and rights of way so granted to defendant under said Raker Act are correctly shown on "Defendant's Exhibit A" in evidence herein.'"

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 37.

Assignment No. 38:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 4 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"4. On page 3, lines 15-16 of said proposed Findings, strike out the words: 'and acquiesced in, and became bound by the terms and conditions thereof'."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 38.

Assignment No. 39:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 5 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"5. Page 3, lines 19 to 22, of said proposed Findings, strike out the words:

'To insure the direct distribution of water [362] and electricity by the City to its inhabitants, and to prevent enjoyment by private corporations of any profits from the Government grant.'

and commence the following word 'it' with a capital."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 39.

Assignment No. 40:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 6 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"6. On page 3, line 27 of said proposed Findings, after Finding 'IV' insert the following:

'IV A

Among the provisions of said Raker Act were the following appearing in Section 9 thereof:

"(1) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also the the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping sub-surface water for drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated and which may be so beneficially used by said irrigation districts or muincipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein: Provided, [363]

That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping sub-surface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(m) That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy as follows: The said grantee shall within three years from the date of the completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser develop-

ment. The said grantee shall develop and use hydro-electric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further, said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file such maps, surveys, field notes, or other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(n) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale,

such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interest demands or convenience requires; and in case of the failure of the grantee to [364] carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use and sale of such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower; and for that purpose the Secretary of the Interior may take possession of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed by the grantee hereunder as may be necessary for the development, transmission, use, and sale of such power.

(o) That the rates or charges to be made by the grantee or any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times

conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior, allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee.' '"

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 40.

Assignment No. 41:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 7 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"7. On page 4, line 1 of said proposed Findings, add the following:

'in connection with the utilization of lands,

rights and privileges owned by the City and acquired by it from other sources'." [365]

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 41.

Assignment No. 42:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 11 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"11. On page 4, line 9 of said proposed Findings, insert a new paragraph to be numbered 'VI A' which shall read as follows:

'VI A

In conformity with the provisions of said Raker Act, and prior to July 1, 1925, the defendant had expended over $45,000,000.00 in the construction of dams, aqueducts, and works, designed to store and deliver a municipal water supply to its inhabitants, had built the Early Intake power house, primarily for the supply of power for construction purposes on the project, and had completed the Moccasin power house capable of generating 80,000 horsepower of hydroelectric energy, and a transmission line adequate to trans-

mit said energy to Newark in Alameda County; the defendant had not acquired and never has been financially able to acquire any distribution system in the City and County of San Francisco or elsewhere for the distribution of such electric energy to consumers; the Company and Great Western Power Company (later consolidated with the Company) were at that time the only distributing companies owning electric distribution systems in San Francisco, and each of them declined to sell or lease its distribution system to the defendant for the purpose of enabling it to distribute thereby to its inhabitants the electric energy generated by it in connection with its said Hetch Hetchy project.' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 42. [366]

Assignment No. 43:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 12 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"12. On page 4, line 25 of said proposed Findings, after the words 'United States', insert the following:

'in connection with lands, water rights, easements and privileges owned by the City and acquired by it from other sources,' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 43.

Assignment No. 44:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 13 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law", in said cause, which said request read as follows:

"13. On page 4, line 28 of said proposed Findings, after the figures '1925' insert the following:

'There never has been and there is not any contract or arrangement between the City and the Company with respect to the delivery and/or distribution of said electric energy, other than said contract of July 1, 1925.' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 44. [367]

Assignment No. 45:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 14 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"14. On page 4, line 29 of said proposed Findings, after the words: 'Hetch Hetchy' insert the following:

'About 3 per cent. of the energy so generated and transmitted is produced in a power plant known as the Early Intake power plant, which is situate on lands granted to the City under the terms of said Raker Act; that the remaining 97 per cent. of said energy is generated in the Moccasin Creek power plant, which is situated entirely on patented land owned by the City, and that the electric energy generated therein, together with the surplus energy from the Early Intake plant, is transmitted from Moccasin power plant to Newark in Alameda County, over lands owned by the City and not acquired by it under the terms of the Raker Act; the only use made by the City of rights granted to it under the Raker Act in connection with said Moccasin Creek plant is the storage of water in the Hetch Hetchy Valley and at Lake Eleanor, partially on lands granted under the Raker Act, and the transmission of said

water through tunnel aqueducts and canals partially on lands granted under the Raker Act; the primary purpose of said reservoirs and aqueducts is to transmit water to San Francisco for municipal water supply purposes; said water would be so transmitted whether the Moccasin Creek power plant, which is on the line of the water conduit, were operated or not.' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 45.

Assignment No. 46:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 15 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read [368] as follows:

"15. On page 5, strike out lines 3 and 4 of said proposed Findings, and in lieu thereof insert the following:

'In carrying out said contract of July 1, 1925, the City and the Company have proceeded as follows:' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's ex-

ception thereto being designated in the record herein as Ruling and Exception No. 46.

Assignment No. 47:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 16 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "16. On page 5, line 7 of said proposed Findings, insert before the word 'Determination' the words: 'Subject to the provisions of said contract,' and change the 'D' in 'Determination' to a small letter."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 47.

Assignment No. 48:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 17 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "17. On page 5, line 14 of said proposed Findings, insert after the word 'disposition', the words: [369]

'but in a physical sense only and subject to the provisions of said contract of July 1, 1925' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 48.

Assignment No. 49:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 18 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"18. On page 5, line 16 of said proposed Findings, strike out the words: 'it is provided that from' and in lieu thereof insert the words: 'the parties to said contract deducted' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 49.

Assignment No. 50:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 19 of Defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of

Law" in said cause, which said request read as follows:

"19. On page 5, lines 17 and 18 of said proposed Findings, strike out the words: 'shall be deducted' and in lieu thereof insert the word: 'thereof'".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 50. [370]

Assignment No. 51:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 21 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"21. On page 5, lines 21 to 25 of said proposed Findings, strike out the sentence commencing with the words: 'Deduction of 24 per cent' and ending with the words: 'for such energy'".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 51.

Assignment No. 52:

That said Court erred in its ruling by which it denied and refused to find in accordance with the

request contained in paragraph numbered 22 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "22. On page 6, line 14 of said proposed Findings, strike out the words: 'under the contract', and insert the word 'exact' at the end of said line."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 52.

Assignment No. 53:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 23 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request, read [371] as follows:

> "23. On page 6, line 16 of said proposed Findings, after the word: 'consumers' insert the following:
>
> 'to the extent that payments made to the City are computed in accordance with the formula prescribed in said contract, and have not taken into account changes made by the Railroad Commission of California in each

of the years 1935, 1936 and 1937, in respect of the rates chargeable to consumers' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 53.

Assignment No. 54:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 24 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"24. On page 6, between lines 16 and 17 of said proposed Findings, insert three new paragraphs to be numbered '3a', '3b' and '3c', which shall read as follows:

'3a. In and by said contract of July 1, 1925, it is provided that the rates at which the electric energy delivered by the City to the Company under said contract shall be sold to consumers in the City and County of San Francisco, shall be those fixed by the Railroad Commission of the State of California; said rates are the rates which at all times since July 1, 1925 have been and are now operative and binding upon the Company with respect to all electric energy generated by it which it sells in said City and

County of San Francisco; said rates were adopted by the City and the Company in and by said contract of July 1, 1925, as the rates which should be charged to consumers of the electric energy generated by the City and delivered by it to the Company for transmission and distribution, as provided in said contract, for the reason that it would be impractical to charge consumers of electric energy generated by the Company, at one rate, and to charge consumers of the electric energy generated by the City at a different rate; [372]

3b. Since the execution of said contract of July 1, 1925, the City has received and is still receiving for the electric energy delivered by it to the Company the percentage of the average rate paid to the Company by consumers in the City and County of San Francisco, which in and by said contract it is provided that it shall receive; said average rate as fixed by said contract has remained constant, however, and has not been varied to conform to the rates fixed by the Railroad Commission of California in the years since the execution of said contract; as the result of the failure to vary said average rate of return to conform to the rates fixed by said Railroad Commission, the City has received from the Company $25,000.00 more than it would have received if said return had varied

in conformity with the rates fixed by said Railroad Commission as by said contract it is provided that said return should vary;

3c. The net revenue to the City from the disposition and distribution of the electric energy generated by it, in accordance with the aforesaid contract of July 1, 1925, between the City and the Company, is and at all times has been approximately $2,200,000.00 per year.' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 54.

Assignment No. 55:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 25 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"25. On page 6, lines 25 to 28, inclusive, of said proposed Findings, strike out the sentence commencing with the words: 'The City is assured' and ending with the words: 'its acceptance or use' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's

exception thereto being designated in the record herein as Ruling and Exception No. 55. [273]

Assignment No. 56:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 26 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "26. On page 6, lines 30 and 31 of said proposed Findings, after the words: 'are fixed', strike out the words: 'not by the City but by the State Railroad Commission', and in lieu thereof insert the following:
>
> 'not by the Railroad Commission of California, but by the City, which, however, adopts the rates prescribed by said Railroad Commission of California, as the rates which may be charged by private utility corporations to consumers of electric energy' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 56.

Assignment No. 57:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 27 of

defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"27. On page 7, lines 4 to 6 of said proposed Findings, strike out all of the paragraph numbered 6 and in lieu thereof insert the following:

'6. Electric energy originating at Hetch Hetchy is distributed by the Company, in the normal course of its business, to the persons, firms and corporations who, are customers therefor at the time of distribution'".

Counsel for the defendant duly excepted to said ruling of the [374] Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 57.

Assignment No. 58:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 28 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"28. On page 7, lines 14 to 17 of said proposed Findings, strike out all of paragraph '9' and in lieu thereof insert the following:

'Except as next stated, the Company makes no accounting to the City of its sales of elec-

tricity to consumers. The amount of electricity delivered to the Company by the City at Newark is determined by joint meter readings at Newark, and the formulae specified in the contract of July 1, 1925, are applied to said quantity and the City merely bills the Company for said quantity in accordance with said formulae' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 58.

Assignment No. 59:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 29 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"29. On page 7, lines 21 and 22 of said proposed Findings, strike out the words: 'for sale of Hetch Hetchy power to the Company by the City', and in lieu thereof insert the following:

[375]

'of July 1, 1925. The power so purchased by the City from the Company, however, has different characteristics from that delivered by the City to the Company at Newark; after receiving the energy at Newark the Com-

pany steps down the voltage of said energy and regulates it through transformers and condensors; for municipal railway use, it converts a large part of the current from alternating current with a 60 cycle frequency to direct current having no frequency, radically changes the load factor, and, by its standby service, protects the City's requirements for electric energy for the various purposes for which it is used by the City' ".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 59.

Assignment No. 60:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 31 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"31. On page 7 of said proposed Findings, strike out all of paragraph 'X' from the 'Findings of Fact', because the subject matter thereof is not a finding of fact, but is a conclusion of law, and, as such, should be included in the 'Conclusions of Law', if the subject matter is to be, at all, included in the 'Findings of Fact and Conclusions of Law', in said cause."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 60.

Assignment No. 61:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered [376] 34 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "34. On page 9 of said proposed Findings, strike out the figure 'XIII' and all of the paragraph of that number, and in lieu thereof insert the following:
>
> 'XI.
>
> Unless restrained by this Court, the City will continue to dispose of the electric energy generated by it at Hetch Hetchy in the manner hereinbefore stated.'"

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 61.

Assignment No. 62:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 35 of

defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"35. On page 9, line 10 of said proposed Findings, insert four new paragraphs to be numbered 'XII', 'XIII', 'XIV' and 'XV', which shall read, respectively, as follows:

'XII.

The manner of disposition and distribution by the City of the electric energy generated by it in connection with its Hetch Hetchy project, in accordance with the aforesaid contract of July 1, 1925, ("United States Exhibit 6"), has not, at any time, damaged, and does not damage, the plaintiff in any respect or to any extent or in any amount;

XIII.

If the City shall be prevented from disposing of the electric energy generated by it in connection with its Hetch Hetchy project, as provided in said [377] contract of July 1, 1925 ("United States Exhibit 6"), or in some other manner by which it shall be permitted to use the transmission and distribution facilities of a private corporation for such purpose, it will suffer a loss of approximately $2,200,000.00 per year and will be damaged in that amount and to that extent.

XIV.

Any sudden disruption of operations under said contract of July 1, 1925 ("United States Exhibit 6") or any sudden cessation of the disposal and distribution of the electric energy generated by the City at its above mentioned power plants in connection with the so-called Hetch Hetchy water project, in the manner provided in said contract, would result in serious economic waste; for said reason, the City should be allowed a reasonable period within which to provide a mode of disposing of and distributing said electric energy, which will not violate the provisions of the Raker Act; a reasonable period to allow the City for said purpose is one year, to commence on the day when the decree herein shall become final; the injunction to be issued herein should not be issued prior to the expiration of said period.

XV.

It is appropriate that the Court reserve jurisdiction of the cause for the purpose of modifying its Decree to be entered herein, so as to permit the City to transmit and distribute the electric energy generated by it in connection with its said Hetch Hetchy project, either by contract with a private corporation, or otherwise, in a manner which will not constitute a violation of the Raker Act'."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 62.

Assignment No. 63:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 36. of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "36. On page 9, lines 18 to 22, inclusive, of said [378] proposed Findings, strike out the first of the 'Conclusions of Law' and in lieu thereof insert the following:
>
> 'The contract of July 1, 1925 is a contract to sell for resale the electric energy generated by the City at Hetch Hetchy; said contract contemplates a sale of electric energy thereunder, includes a sale to the Company by the City of the right to resell the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark; said contract is prohibited by and is in violation of the provisions of the Raker Act prohibiting such sale'."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 63.

Assignment No. 64:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 37 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

> "37. On page 9, strike out the second of the 'Conclusions of Law' and in lieu thereof insert the following:
>
> 'The contract between the City and the Company is a grant by the City to the Company of the right to sell the electric energy generated by the City at Hetch Hetchy and is a selling to the Company of the right to sell said electric energy in violation of the prohibition of Section 6 of the Raker Act'."

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 64.

Assignment No. 65:

That said Court erred in its ruling by which it denied and refused [379] to find in accordance with the request contained in paragraph 39 defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"39. On page 10, line 19, before the words: 'United States', insert the following:

'Subject to the provisions of the next succeeding paragraph "VI" hereof,' "

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 65.

Assignment No. 66:

That said Court erred in its ruling by which it denied and refused to find in accordance with the request contained in paragraph numbered 40 of defendant's proposed amendments to Plaintiff's proposed "Findings of Fact and Conclusions of Law" in said cause, which said request read as follows:

"40. On page 10, line 28, insert the following:

"The United States is entitled to a decree which shall order, adjudge and decree as follows:

(1) That one (1) year after this Decree shall have become final, either through the lapse of the time limited for an appeal therefrom without any appeal having been taken, or through the affirmance by the Court, which shall have finally disposed of any appeal taken therefrom, the Clerk of this Court issue out of this Court and under the seal thereof, a Writ of Injunction directed to the defend-

ant and enjoining and restraining it from distributing or otherwise disposing of the electric energy generated by it at Moccasin Creek Power House and/or Early Intake Power House in connection or in conjunction with its so-called Hetch Hetchy Water Project, in the manner provided in said contract of July 1, 1925, ("United States Exhibit 6"), and directing that unless it shall cease from distributing or otherwise disposing of said electric energy in the manner provided in said last mentioned contract, it be enjoined and restrained from using for the generation and transmission of said electric energy, any of the [380] rights granted to it in and by the Statute of the United States, approved December 19, 1913 (38 Stats. at L. 241) commonly known as and called the Raker Act.

(2) That each of the parties hereto bear and pay its costs of suit herein.

(3) That the defendant shall have the right to submit to the Court at any time any plan, contract or arrangement for the transmission, distribution and disposal of the electric energy generated by it in connection with its Hetch Hetchy project which, in its opinion, does not constitute a violation of the provisions of said Raker Act, and to apply to the Court at the foot of the decree for a modification of said decree and of the injunction thereby directed to issue, which

will permit it to transmit, distribute and dispose of said electric energy in accordance with such plan, contract or arrangement, and the Court hereby retains jurisdiction of the cause for the purpose of entertaining such application, if any be made, and of granting the same if, upon the proof offered in support thereof, it shall seem proper so to do".

Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 66.

Assignment No. 67:

That said Court erred in finding (in its Opinion filed herein April 11, 1938) that the provisions of Section 6 of the Raker Act are an integral part of a statute enacted by Congress in the exercise of its lawmaking power and are not provisions set up by the Congress in the exercise of proprietary powers of the United States.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 67.

Assignment No. 68:

That said Court erred in finding (in its Opinion filed herein April 11, 1938) that "the City itself purchases electricity from the Company [381] just as any other customer does".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 68.

Assignment No. 69:

That said Court erred in finding (in its Opinion filed herein April 11, 1938) that "control of Hetch Hetchy power is in the hands of the Company from the moment that City electricity enters the Company's lines at Newark".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 69.

Assignment No. 70:

That said Court erred in finding (in its Opinion filed herein April 11, 1938) that "rates to be charged consumers of Hetch Hetchy power are not fixed by the City".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 70.

Assignment No. 71:

That said Court erred in finding (in its Opinion filed herein April 11, 1938) that electrical energy

"cannot be allocated on a pro rata basis when a commingling occurs",

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 71. [382]

Assignment No. 72:

That said Court erred in its conclusion of law (in its Opinion filed herein April 11, 1938) that the agreement of July 1, 1925, between the City and the Company is "one of sale, with title to the electricity passing to the Company at Newark".

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 72.

Assignment No. 73:

That said Court erred in its conclusion of law (in its Opinion filed herein April 11, 1938) that the arrangement for the distribution and disposal of electric energy effected by the agreement of July 1, 1925, between the City and the Company complied "neither with the letter nor the spirit of the Federal Grant by means of which San Francisco was enabled to construct the Hetch Hetchy project".

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion

of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 73.

Assignment No. 74:

That said Court erred in its conclusion of law (in its Opinion filed herein April 11, 1938) that "the Raker Act is not being complied with by San Francisco".

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 74. [383]

Assignment No. 75:

That said Court erred in its conclusion of law (in its Opinion filed herein April 11, 1938) that the plaintiff "is entitled to an injunction directing the City to cease its present disposal of electric power or be restrained from using the rights granted by the Raker Act for the generation and transmission of such power".

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 75.

Assignment No. 76:

That said Court erred in its implied conclusion of law (in its Opinion filed herein April 11, 1938) that the provisions of Section 6 of the Raker Act

are conditions, the violation of which would involve or justify a forfeiture of the or any of the rights granted by the Raker Act.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 76.

Assignment No. 77:

That said Court erred in its conclusion of law (in its Opinion filed herein April 11, 1938) that the City should be restrained from using, for the generation and transmission of electric energy, the rights granted by the Raker Act, unless it desists from distributing and disposing of said electric energy in accordance with the agreement of July 1, 1925, between it and the Company.

Counsel for the defendant duly excepted to the ruling involved in [384] the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 77.

Assignment No. 78:

That said Court erred in finding (in Paragraph IV of the Court's "Findings of Fact" filed herein June 24, 1938) that the provisions of Section 6 of the Raker Act were incorporated in said Act to insure the direct distribution of electricity by the City.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 78.

Assignment No. 79:

That said Court erred in finding (in paragraph IV of the Court's "Findings of Fact" filed herein June 24, 1938) that the provisions of Section 6 of the Raker Act were incorporated in said Act "to prevent enjoyment by private corporations of any profits from the" grant made by the Raker Act.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 79.

Assignment No. 80:

That said Court erred in the implied findings (in Paragraph IV of the Court's "Findings of Fact" filed herein June 24, 1938) that the City is now generating and transmitting electricity, solely, through the utilization of the lands, rights and privileges granted to it by the Raker Act and not through the use of said lands, rights and privileges in conjunction with the use of said lands, rights and privileges owned by the [385] City and acquired by it from persons, firms and corporations, other than the United States.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 80.

Assignment No. 81:

That said Court erred in finding (in subparagraph 1 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "determination of how much electricity shall be accepted at any time is made by the load dispatcher of the Company, the Company's dispatcher actually giving the orders which control the operation and output of the City's plants", which said finding is unqualified by and gives no effect to the provisions of the agreement of July 1, 1925, dealing with the subject matter.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 81.

Assignment No. 82:

That said Court erred in finding (in subparagraph 1 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "from the time electric energy originating at Hetch Hetchy enters the system of the Company at Newark, the City is without power over, and the Company has

exclusive and entire control of, its disposition" which said finding is unqualified by and gives no effect to the provisions of the agreement of July 1, 1925, dealing with the subject matter.

Counsel for the defendant duly excepted to the ruling involved in [386] the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 82.

Assignment No. 83:

That said Court erred in finding (in subparagraph 2 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "In determining the amount which should be paid to the City, it is provided that from the amount of energy delivered to the Company at Newark, 24 per cent shall be deducted as representing the amount of transmission, sub-station and distribution loss between time of receipt of the energy from the City by the Company at Newark and delivery to the ultimate consumers", which said finding is unqualified and treats the 24 per cent deduction mentioned therein as a mere factor for determining the price to be paid by the Company to the City, and gives no effect to the fact that 24 per cent is the amount of transmission, substation and distribution losses, actually found by experience to occur between Newark and consumers's meters in San Francisco.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said

ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 83.

Assignment No. 84:

That said Court erred in finding (in subparagraph 3 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "The price which the City receives for its energy under the contract is in practice fixed and without direct relation to the actual revenue received from its sale to consumers", which said finding is unqualified and gives no effect to the fact that the price which the City receives [387] from the Company is without direct relation to the actual revenue received by the Company from its sales to consumers only in the sense and to the extent that payments made by the Company to the City have been computed in accordance with the formula specified in the agreement of July 1, 1925, and have not taken into account certain reductions in rates made by the Railroad Commission of the State of California in each of the years 1935, 1936 and 1937.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 84.

Assignment No. 85:

That said Court erred in the unqualified finding (in subparagraph 5 of Paragraph IX of the Court's

"Findings of Fact" filed herein June 24, 1938) that "The rates charged to consumers of electric energy originating at Hetch Hetchy are fixed not by the City but by the State Railroad Commission".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 85.

Assignment No. 86:

That said Court erred in finding (in subparagraph 9 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that the "electric energy originating at Hetch Hetchy is disposed of by the Company to its usual customers in the normal course of its retail trade", without qualifying said finding by the further finding that said customers of the Company were, also, in fact, customers of the defendant.

Counsel for the defendant duly excepted to the ruling involved in [388] the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 86.

Assignment No. 87:

That said Court erred in the unqualified finding (in subparagraph 9 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "To the City the Company makes no account-

ing of its sales of electricity to consumers".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 87.

Assignment No. 88:

That said Court erred in finding (in subparagraph 9 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that the accounting between the City and the Company "is limited to monthly statements by the City to the Company for electricity at Newark".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 88.

Assignment No. 89:

That said Court erred in the unqualified finding (in subparagraph 10 of Paragraph IX of the Court's "Findings of Fact" filed herein June 24, 1938) that "The City is itself a purchaser from the Company of power, part of which originates at Hetch Hetchy, and on terms which have no relation to those specified in the contract for sale of Hetch Hetchy power [389] to the Company by the City".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said

ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 89.

Assignment No. 90:

That said Court erred in finding (in Paragraph X of the Court's "Findings of Fact" filed herein June 24, 1938) that the contract between the City and the Company is a contract to sell for resale.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 90.

Assignment No. 91:

That said Court erred in finding (in Paragraph X of the Court's "Findings of Fact" filed herein June 24, 1938) that the disposal of electric energy by the City to the Company under the contract of July 1, 1925, constitutes a sale for resale of electric energy generated by the City at Hetch Hetchy.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 91.

Assignment No. 92:

That said Court erred in finding (in Paragraph X of the Court's "Findings of Fact" filed herein June 24, 1938) that "The contract to sell contem-

plates, and the sale of energy thereunder includes, a sale [390] and letting to the Company of the right to resell or sublet the electric energy generated at Hetch Hetchy by the City and delivered to the Company at Newark".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 92.

Assignment No. 93:

That said Court erred in finding (in Paragraph XII of the Court's "Findings of Fact" filed herein June 24, 1938) that "The City is now selling or letting to the Company, the right to sell or sublet the electric energy generated at Hetch Hetchy and delivered by the City to it".

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception, No. 93.

Assignment No. 94:

That said Court erred in finding (in Paragraph XII of the Court's "Findings of Fact" filed herein June 24, 1938) that unless restrained, the City will "continue to so dispose of said power and to so sell or let to that Company the right to sell or sublet the electric energy delivered to it under the contract" of July 1, 1925.

Counsel for the defendant duly excepted to the ruling involved in the making of said finding, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 94. [391]

Assignment No. 95:

That said Court erred in drawing the conclusion of law (in Paragraph I of the Court's "Conclusions of Law" filed herein June 24, 1938) that the method of disposal by the City to the Company of the electric energy in accordance with the contract of July 1, 1925, "includes a selling and letting by the City to the Company of the right to sell or sublet" such energy.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 95.

Assignment No. 96:

That said Court erred in drawing the conclusion of law (in Paragraph I of the Court's "Conclusions of Law" filed herein June 24, 1938) that the method of disposal by the City to the Company of the electric energy in accordance with the contract of July 1, 1925, is within the prohibition of Section 6 of the Raker Act.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of

law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 96.

Assignment No. 97:

That said Court erred in drawing the conclusion of law (in Paragraph II of the Court's "Conclusions of Law" filed herein June 24, 1938) that the provisions of Section 6 of the Raker Act "are a part of a valid statute enacted by Congress in the exercise of its legislative power over public lands and having the force of law in its entirety".

Counsel for the defendant duly excepted to the ruling involved in [392] the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 97.

Assignment No. 98:

That said Court erred in drawing the conclusion of law (in Paragraph II of the Court's "Conclusions of Law") that enforcement of the express provisions of Section 6 of the Raker Act "is not subject to estoppel or other equitable defense".

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 98.

Assignment No. 99:

That said Court erred in drawing the conclusion of law (in Paragraph III of the Court's "Con-

clusions of Law") that the United States has no plain, speedy or adequate remedy at law.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 99.

Assignment No. 100:

That said Court erred in drawing the conclusions of law (in Paragraph IV of the Court's "Conclusions of Law") that the plaintiff is entitled to an injunction perpetually restraining the defendant from disposing, in accordance with the agreement of July 1, 1925, between defendant and the Company, of electric energy generated by the City in connection with its Hetch Hetchy project. [393]

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 100.

Assignment No. 101:

That said Court erred in drawing the implied conclusion of law (in Paragraph IV of the Court's "Conclusions of Law") that the provisions of Section 6 of the Raker Act are conditions, the violation of which by the defendant would entail or justify a forfeiture of the or some of the rights granted by the Raker Act.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 101.

Assignment No. 102:

That said Court erred in drawing the conclusion of law (in Paragraph IV of the Court's "Conclusions of Law") that in default of desisting from its disposal, in accordance with the agreement with the Company dated July 1, 1925, of the electric energy generated by it in connection with its Hetch Hetchy project, the defendant be enjoined and restrained from utilizing, for such disposal, the lands, rights and privileges granted to it, by the Raker Act for the purpose of generating electric energy.

Counsel for the defendant duly excepted to the ruling involved in the drawing of said conclusion of law, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 102. [394]

Assignment No. 103:

That said Court erred in making its order of June 28, 1938 (nunc pro tunc, as of April 11, 1938) by which it denied defendant's motion for a dismissal of said cause made at the conclusion of the hearing of said cause.

Counsel for the defendant duly excepted to said order and to the ruling involved, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 103.

Assignment No. 104:

That said Court erred in making its decree in said cause which was filed June 28, 1938, in and by which said Court provided that the defendant should be enjoined from distributing and disposing of electric energy generated by it in connection with its Hetch Hetchy project in the manner provided by the agreement of July 1, 1925, between the defendant and the Pacific Gas & Electric Company, and that unless it did so it should be restrained from using for the distribution and disposal of said electric energy, any of the rights or privileges granted to it by the Raker Act.

Counsel for the defendant duly excepted to said decree and to the ruling involved therein, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 104.

Assignment No. 105:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that the provisions of Section 6 of the Raker Act are conditions and not covenants. [395] The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 106:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that the disposition of property not granted to the City and County of San Francisco by the Raker Act (i.e., the electric energy generated and owned by the defendant) might be and that it was constitutionally restricted by the provisions of Section 6 of the Raker Act. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 107:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that it was within the law making power of Congress under the Constitution of the United States to restrict, in the manner attempted by Section 6 of the Raker Act, the disposition by the defendant of the electric energy generated by it in connection with its Hetch Hetchy project. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed ex-

cepted to) but said exeception is not numbered in the record herein. [396]

Assignment No. 108:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that the provisions of Section 6 of the Raker Act were and are enforcible against the defendant. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 109:

That said Court erred in the ruling in its Decree herein that the defendant's method of disposal of the electric energy generated and transmitted by it through a utilization of the lands, rights and privileges granted to it by the Raker Act (i.e., in accordance with its contract of July 1, 1925, with Pacific Gas and Electric Company) is a violation of the provisions of Section 6 of said Raker Act, which prohibit the sale or letting or the right to sell such electric energy. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 110:

That said Court erred in the ruling in its decree herein that any disposal by the defendant of the electric energy generated and transmitted by it through a utilization of the lands, rights and privileges granted to it through the Raker Act, whereby the right to sell or sublet said energy is sold or sublet to any private corporation or individual, will likewise violate the provisions of Section 6 of the Raker Act. The defendant duly excepted to said ruling through [397] the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 111:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that the plaintiff did not waive the provisions of Section 6 of the Raker Act by acquiescing in a period of more than ten years from and after July 1, 1925 in defendant's mode of distributing and disposing of the electric energy generated by it in connection with its Hetch Hetchy project, in accordance with said contract of July 1, 1925. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 112:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, and in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that the provisions of Section 6 of the Raker Act with respect to the distribution and disposal of the electric energy generated by the defendant in connection with its Hetch Hetchy project were not impossible of performance, by reason of the fact that the bonded debt limitations imposed by the Constitution of California upon the defendant prevented the defendant from acquiring its own system for the transmission, distribution and disposal of said electric energy and compelled the defendant to use the system of a public utility corporation for the purpose as the defendant did by and through its contract of July 1, [398] 1925 with Pacific Gas and Electric Company. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 113:

That said Court erred in the ruling implied in the Findings of Fact and Conclusions of Law contained in its Opinion filed April 11, 1938, in its Findings of Fact and Conclusions of Law filed June 28, 1938, and in its Decree filed June 28, 1938, that it was

and is within the constitutional law-making power of the Congress of the United States of America to impose restrictions upon the use of property of a municipal corporation of a state of the United States, such as were sought to be imposed by the City and County of San Francisco by the provisions of Section 6 of the Raker Act, in respect of the disposition and distribution of the electric energy generated by said City and County in connection with its Hetch Hetchy Project, and that the provisions of said Section 6 of said Raker Act, considered as an enactment by the Congress of the United States in the exercise of its law-making power under the Constitution of the United States, were not unconstitutional. By its said ruling, said Court deprived the defendant of rights and immunities granted and guaranteed to it by the Constitution of the United States, and particularly by the provisions of Section 8 of Article I of said Constitution, by the provisions of Article IX, Article X, and by the provisions of Section 1 of Article XIV of the amendments to said Constitution, the benefit of which rights and immunities and of said Constitution and the Articles and Sections thereof and of the amendment thereto last mentioned, the defendant invoked and invokes and relied and relies upon. The defendant duly excepted to said ruling through the operation of Rule 22 of this Court (under which said ruling was [399] deemed excepted to) but said exception is not numbered in the record herein.

Assignment No. 114:

That said Court erred in denying the defendant's petition for a rehearing of said cause. Counsel for the defendant duly excepted to said ruling of the Court, said ruling and defendant's exception thereto being designated in the record herein as Ruling and Exception No. 105.

Wherefore, in order that the foregoing assignments of error may be and appear of record, said defendant presents the same to the Court, and prays that such disposition thereof be made as is in accordance with law and the statutes of the United States in such cases made and provided, to the end that said decree be reversed.

Dated: October 17th, 1938.

JNO. J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant.

[Endorsed]: Filed Oct. 17, 1938. [400]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL, FIXING AMOUNT OF SECURITY, AND DIRECTING CITATION TO ISSUE.

The defendant in the above entitled cause, having this day presented to the Court its petition for an order allowing its appeal from the decree in said

cause which was made, filed and entered therein on June 28, 1938, fixing the amount of the security to be required of it to perfect its said appeal, and directing that a citation issue to plaintiff as provided by law;

It Is Hereby Ordered:

(1) That said appeal be and the same is hereby allowed upon defendant giving a bond in the sum of Five Hundred Dollars ($500.00) which shall be conditioned as required by law and shall be approved by this Court; and [401]

(2) That a citation to the plaintiff issue as provided by law.

Dated: October 17th, 1938.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Oct. 17, 1938. [402]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents: That we, City and County of San Francisco, State of California, a municipal corporation, as principal, and Massachusetts Bonding and Insurance Company, a corporation, organized under the laws of the State of Massachusetts and duly qualified to do business in the State of California, and to execute bonds of the character herein mentioned, as surety, are

held and firmly bound to United States of America, plaintiff in the above entitled cause, in the sum of Five Hundred Dollars ($500.00) to be paid to said plaintiff, for the payment of which well and truly to be made, we hereby bind ourselves and our respective successors and assigns, jointly and severally, firmly, by these presents.

Whereas, on the 28th day of June, 1938, in the Southern [403] Division of the District Court of the United States, for the Northern District of California, in a suit then pending in said Court, and numbered 4173-R on the Equity Docket of said Court, in which suit the above named plaintiff was plaintiff, and the above named defendant was defendant, a decree was rendered against said defendant and said defendant has obtained from said court an order allowing an appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and has had a citation issued, directed to said plaintiff, and citing and admonishing it to be and appear at a session of said United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City and County of San Francisco, State of California, within thirty (30) days from the date of said citation;

Now, Therefore, the condition of the above obligation is such that if said defendant shall prosecute its said appeal to effect and shall answer all costs, if it fail to make its plea good, then said obligation shall be void, otherwise it shall remain in full force and effect.

It is expressly agreed that in case of a breach of the condition hereof, the above entitled Court, upon notice of not less than ten (10) days to the surety hereunder, may proceed summarily in the cause to determine the amount which said surety is bound to pay on account of such breach, and may render judgment for such amount against said surety and award execution therefor.

In Witness Whereof, we execute this bond this 17th day of October, 1938.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation,

By ANGELO J. ROSSI

Mayor, Principal.

a corporation,

By GUS A. ELBOW

Its Attorney in Fact,

Surety.

Approved as to form.

JNO. J. O'TOOLE

City Attorney.

State of California,
County of San Francisco.—ss.

On this 17th day of October in the year one thousand nine hundred and thirty-eight, before me Carl L. Maritzen, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Gus A. Elbow, known to me to be the duly authorized Agent

an Attorney-in-Fact of the Massachusetts Bonding and Insurance Company, the corporation whose name is affixed to the foregoing instrument; and duly acknowledged to me that he subscribed the name of the Massachusetts Bonding and Insurance Company thereto as Surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) CARL L. MARITZEN

Notary Public in and for said County and State.

My commission expires July 30, 1939. [404]

The above bond is hereby approved.

Dated: October 17, 1938.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Oct. 17, 1938. [405]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
City and County of San Francisco—ss.

Harold J. Boyd, being first duly sworn, deposes and says:

That he now is, and ever since the 17th day of June, 1937, has been, the duly appointed, qualified, confirmed and acting Controller of the City and

County of San Francisco, appointed to said position by the Mayor of said City and County pursuant to the provisions of Section 63 of the Charter of said City and County of San Francisco, and that pursuant to the provisions of Section 64 of said Charter he is the Auditor and General Accountant of said [406] City and County and as such exercises general supervision over the accounts of all officers, commissions, boards and employees of said City and County charged in any manner with the receipt, collection or disbursement of the City and County or other funds in their respective capacities as City and County officials or employees;

That as such Controller, under and pursuant to the provisions of said Section 64 of the Charter, it is his duty to keep accounts and to provide accounting procedure to record:

(a) All budgeted revenues and appropriations together with additions or transfers thereto and therefrom and to show at all times the amount of encumbrances, expenditures or transfers therefrom and the balances therein;

(b) All revenues accrued and liabilities incurred;

(c) All cash receipts and disbursements;

(d) In general, all transactions affecting the acquisition, custody or disposition of values;

That, under and pursuant to the provisions of Section 69 of the Charter, it is the duty of every department and office of the City and County of San Francisco, and of each utility under the control

of the Public Utilities Commission, to make and file with the said Controller, not later than the 15th day of February of each year, a budget estimate setting forth the proposed expenditures and estimated revenues of said respective departments and offices for the coming fiscal year which commences on the first day of July of each year;

That, pursuant to the provisions of said Section, the Public Utilities Commission of said City and County of San Francisco filed with said Controller, on or before the 15th day of February, 1938, a statement of the estimated revenues and expenditures relative to the operation and production of hydro-electric [407] power generated in connection with the Hetch Hetchy project, which said project is under the control and jurisdiction of said Public Utilities Commission;

That said Public Utilities Commission estimated the revenues to the City and County of San Francisco, for the fiscal year commencing July 1, 1938, from said hydro-electric power generated on the said Hetch Hetchy project at the sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars;

That pursuant to the provisions of said Section 69 of the Charter, said Controller, upon receiving said statement of the estimated revenues and expenditures, checked the same and found that said estimates were true and correct as far as he could ascertain, and that said Controller did, not later than the 15th day of March, 1938, consolidate,

all and singular, the budget estimates furnished to him by the several departments of the government of the City and County of San Francisco and did transmit them to the Mayor of said City and County in accordance with the provisions of said section, and that said consolidated budget so transmitted to the Mayor showed, and did contain, all and singular, the proposed expenditures of each department of the City and County of San Francisco and the estimated revenues therefrom; and the proposed expenditures and estimated revenues incident to the generation of said hydro-electric power all of which was submitted by said Public Utilities Commission was included in said consolidated budget;

That at the time of submitting said consolidated budget said Controller did also submit to said Mayor a statement showing the anticipated revenues and other receipts from the generation of said hydro-electric power on said Hetch Hetchy project for said ensuing fiscal year;

That thereafter the Mayor of the City and County of San [408] Francisco held public hearings on the budget estimates submitted to him by said Controller, said Controller being present at all of said hearings; and that said Mayor made no changes in the estimated revenues to be received by the City and County of San Francisco for the fiscal year commencing July 1, 1938, from the generation of hydro-electric power on said Hetch Hetchy project but approved said estimate and, not later than the first day of May, 1938, transmitted to the Board

of Supervisors said budget estimate for all departments and offices of said City and County of San Francisco and the proposed budget of expenditures of said City and County for the said fiscal year commencing July 1, 1938, which consolidated budget estimate included a detailed estimate of all revenues from each department of the City and County of San Francisco for said fiscal year and in which said estimate of revenues was included the sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars as the revenue from the generation of hydro-electric power on the Hetch Hetchy project, and with said budget estimate submitted by said Mayor as hereinbefore set forth, said Mayor submitted a draft of the Annual Appropriation Ordinance for the said fiscal year commencing July 1, 1938, which showed, all and singular the various and several amounts to be expended by said City and County during the said fiscal year;

That thereafter, and under and pursuant to the provisions of Section 72 of the Charter, the Board of Supervisors, after due notice by publication as provided in said section, fixed a date or dates for public hearings on said proposed budget and said proposed appropriation ordinance, and in conformance with the notice given of said hearings, held public hearings on the said proposed budget and proposed appropriation ordinance; that said Board of Supervisors made no change in the estimated revenues, as set for h in said budget estimate, which were to be received by [409] said City and County

from the generation of hydro-electric power on said Hetch Hetchy project; and thereafter said Board of Supervisors passed an Annual Appropriation Ordinance, which said ordinance set forth all the anticipated revenues which were to be received, and all anticipated expenditures which were to be paid out by the City and County of San Francisco during the fiscal year commencing July 1, 1938, a copy of which Annual Appropriation Ordinance is attached hereto and marked Exhibit A and made a part hereof and from which it will appear, on page 7 thereof, that said Board of Supervisors, in finally passing said ordinance anticipated the revenue to be received from the generation of hydro-electric power on said Hetch Hetchy project at the sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars;

That this affiant states that the said revenue received from the generation of hydro-electric power on the Hetch Hetchy project is received in practically equal monthly installments and that should said revenue be discontinued as of the 28th day of December, 1938, the City and County of San Francisco will be deprived of approximately One Million Two Hundred Thirty Thousand Five Hundred ($1,230,500.00) Dollars revenue which it anticipated would be received for the purpose of carrying on its municipal functions for the fiscal year commencing July 1, 1938;

That on the 28th day of August, 1926, the Supreme Court of the State of California, in an action

entitled Adolph Uhl vs. John B. Badaracco, et al, which said action was numbered in said Court S. F. No. 12,161, decided, adjudged, decreed and determined that the portion of the Hetch Hetchy project which was used for the generation of hydro-electric power was an integral part of said Hetch Hetchy project and that the revenue therefrom should be applied as follows: (a) for the payment of operating expenses of the said Hetch Hetchy project; (b) for the necessary repairs and [410] reconstruction of said project; (c) for the payment of interest on, and the sinking fund of, the bonds issued for the construction of said project;

That at the time of said adjudication by said Supreme Court, said City and County of San Francisco had voted, and approved and sold bonds for the construction of said Hetch Hetchy project in the amount of Fifty Five Million ($55,000,000.00) Dollars, one issue of said bonds being in the sum of Forty Five Million Dollars and another issue being in the sum of Ten Million Dollars; and that subsequent to said Ten Million Dollar issue said City and County of San Francisco issued additional bonds in the sum of Thirty Million Five Hundred Thousand ($30,500,000.00) Dollars for the completion of said Hetch Hetchy project;

That the bond interest and redemption charges for the fiscal year commencing July 1, 1938, on all of said bonds, amounts to Four Million Nine Hundred Ninety Seven Thousand Three Dollars ($4,997,003.00), which said sum is more than the reve-

nues produced from said Hetch Hetchy project; and that in the expenditures provided for in said Annual Budget and Appropriation Ordinance there was appropriated, for the fiscal year commencing July 1, 1938, from said anticipated revenue of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars to be received from the generation of hydro-electric power on said Hetch Hetchy project, the sum of Two Million One Hundred Ninety Thousand Three Hundred Eighty-six ($2,190,386.00) Dollars for the purpose of meeting the bond interest and redemption on said bonds voted for the construction and completion of said Hetch Hetchy project; and that the difference between the said sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars estimated to be received from the generation of hydro-electric power on said Hetch Hetchy project for the fiscal year commencing July 1, 1938, and the [411] said sum of Two Million One Hundred Ninety Thousand Three Hundred Eighty Six ($2,190,386.00) Dollars was estimated and budgeted to be used for the payment of the operating expenses of said Hetch Hetchy project, pension charges for the employees engaged in work thereon, and the proportionate payments for compensation insurance and accident reserve funds established by the Public Utilities Commission, and for repairs, maintenance and reconstruction of said project;

That at the present time there is sufficient water impounded in the several dams maintained in said

Hetch Hetchy project to operate the Moccasin Creek Power House at full capacity during the remainder of the fiscal year commencing July 1, 1938, and to produce the estimated revenue provided for in the budget estimate adopted by said Board of Supervisors as aforesaid and should the said revenue anticipated to be received from the development of hydro-electric power on said project be stopped or curtailed, the said City and County of San Francisco will not be able to meet the several obligations arising by reason of its municipal activities provided for in its Annual Budget and Appropriation Ordinance and will especially be unable to meet the interest and redemption payments on the bonds issued for the construction and completion of said Hetch Hetchy project;

That prior to the 15th day of September, 1938, the Board of Supervisors did, by ordinance, levy a tax upon all the common property in the City and County of San Francisco, the amount which would be provided by said tax together with the total amount of receipts and revenues estimated to be received from all sources, would be sufficient to meet all appropriations made by said Annual Appropriation Ordinance hereinbefore referred to, and that this affiant made all the calculations as to the amount of receipts and revenues to be received from all sources and reported the same to [412] the said Board of Supervisors, and in reporting said receipts and revenues this affiant took into consideration the fact that there would be received, during

the fiscal year commencing July 1, 1938, from the distribution of hydro-electric power generated on said Hetch Hetchy project the sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars;

That said Board of Supervisors, in fixing its annual tax rate for the fiscal year commencing July 1, 1938, took into consideration the fact that there would be received as revenue from the generation of hydro-electric power on the Hetch Hetchy project the said sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars and that in providing for the payment of the interest and redemption of said bonds issued for the construction and completion of said Hetch Hetchy project which might accrue, become due or have to be paid during the fiscal year commencing July 1, 1938, said Board, on the recommendation of said Controller, took into consideration the fact that the anticipated revenue from the generation of hydro-electric power on said Hetch Hetchy project would be Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars;

That if the said sum of Two Million Four Hundred Sixty One Thousand ($2,461,000.00) Dollars is not received from the generation of said hydro-electric power on the said Hetch Hetchy project, the activities of the City and County of San Francisco in administering to the poor, the aged and the needy, and in paying the pensions allowed to widows and orphans, and in carrying on its govern-

mental functions will have to be curtailed or abandoned and the city will not be able to pay the amounts due upon the interest and sinking fund on the bonds issued for the construction and completion of the Hetch Hetchy project and that by reason of said non-payment the City and County of San Francisco will be [413] deemed to have failed in its obligation to meet the bond interest and redemption due on said bonds, all of which will cause the city irreparable loss and damage.

Therefore this affiant submits that no action should be taken by this Honorable Court which would interfere with the payment and production of the revenue anticipated by the officials of the City and County of San Francisco and on which the annual tax rate was based.

HAROLD J. BOYD
Controller.

Subscribed and sworn to before me this 7th day of November, 1938.

[Seal] H. BRUNNER,
Deputy County Clerk.

[Endorsed]: Filed Nov. 7, 1938. [414]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco,

on Monday, the 7th day of November, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: the Honorable Michael J. Roche, District Judge.

[Title of Cause.]

The application for an Order suspending operation of the injunction herein, came on to be heard. John J. O'Toole, and Robert M. Searls, Esqrs., appearing as attorneys for the defendant and Frank J. Hennessy, Esq., United States Attorney, appearing for the plaintiff. Mr. O'Toole presented and filed the Affidavit of Harold J. Boyd, in support of said application. After hearing Mr. O'Toole, Mr. Searls and Mr. Hennessy, it is Ordered that said application for an order suspending operation of injunction, be and the same is hereby continued to December 20th, 1938, for further hearing. [415]

[Title of District Court and Cause.]

ORDER DIRECTING THAT CERTAIN ORIGINAL EXHIBITS BE TRANSMITTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, FOR INSPECTION IN CONNECTION WITH DEFENDANT'S APPEAL.

It appearing to the Court that the map exhibits annexed to plaintiff's amended complaint herein and plaintiff's exhibits 3, 4 and 5, Defendant's Ex-

hibit A (in evidence) and defendant's Exhibits P and Q (for identification) offered upon the hearing of this cause and referred to in the Statement of Evidence for use on defendant's appeal from the final decree herein, are of such size that it is impracticable to include them or photostatic copies of them in the record on appeal, and that it is proper that said exhibits be inspected by the United States Circuit [416] Court of Appeal for the Ninth Circuit upon the hearing of said appeal;

Now, Therefore, It Is Hereby Ordered:

(1) That the map exhibits to the amended complaint herein may be omitted from the printed record on appeal; and

(2) That the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with the record on defendant's said appeal, plaintiff's amended complaint and each of the exhibits above mentioned, for inspection and consideration of said amended complaint and said exhibits by said Court in connection with said appeal.

Dated November 7th, 1938.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Nov. 7, 1938. [417]

[Title of District Court and Cause.]

AFFIDAVIT OF PAUL J. OST

State of California,
City and County of San Francisco.—ss.

Paul J. Ost, being first duly sworn, deposes and says:

That he is the Paul J. Ost who previously testified as a witness called in behalf of defendant in this case, and his testimony appears at pages 180 to 234 of the transcript herein; that he is at the present time Manager and Chief Engineer of the Electrical Power Bureau of the Public Utilities Commission of San Francisco, and is in charge of the operations of the hydro electric power plants [418] on the Hetch Hetchy project, and has been in charge of such operation since the completion of said plants; that by reason of his position he is familiar with the various features and operating problems of the Hetch Hetchy project; that if the City and County of San Francisco were required on December 28, 1938, under the terms of the decree herein to cease from disposing of any of its electric energy through the agency of the Pacific Gas and Electric Company, there would be a shortage of electric energy available for delivery to San Francisco necessary to meet the consumers' demand for such energy, and that a substantial period of time would be required before the Pacific Gas and Electric Company could open up and operate a sufficient number of additional hydro electric units to compensate for such shortage; that as the City of San

Francisco has no distribution system of its own and cannot possibly acquire one prior to December 28, 1938, either by construction or purchase, the only alternative under the terms of the Court's decree would be to shut down the Moccasin power plant and Early Intake power plant on the Hetch Hetchy project. Said power plants are located on the line of the Hetch Hetchy aqueduct, and if the Moccasin power plant is shut down there is no manner by which the flow of water passing through said plant under a very high head could be safely continued unless auxiliary structures and pipe lines were built to by-pass said plant. Affiant estimates that the cost of such structures and pipe lines would exceed the amount of $100,000, and no funds have been appropriated or are available for such construction; that unless such structures were built it would be necessary to close the gates at the Early Intake end of the eighteen mile Mountain Division tunnel on the Hetch Hetchy project and prevent the water of the Tuolumne River from flowing [419] through said tunnel. This in turn would cut off a substantial part of the present water supply of San Francisco and allow it to go to waste down the Tuolumne Canyon. If the third paragraph of the Court's decree were made effective it would require the City to open all gates in the Hetch Hetchy reservoir, and drain said reservoir, and at the same time to close all gates in the aqueduct leading from the Tuolumne Canyon, permitting all of the water of the Tuolumne River to waste down stream, with possible flood injury to farm lands in the valley

and possible detriment to the City's water rights due to wastage and non-user.

Affiant further states that if said power plant were shut down and all of the revenue therefrom thereby cut off, the City would be under expense aggregating at least $50,000 a year for operating and maintenance costs of its valuable power plants and structures, all of which would have to be provided from other sources than power revenues.

Affiant further states that if said power plant were shut down it would result in the necessary discharge of about eighty men actually engaged in the production and transmission of electricity and water and in maintaining the City's power houses. The earnings of these men aggregate $156,000 a year and enable them to support their families. They have been in the City's employ from five to fifteen years, and affiant is informed and believes that under present conditions would have great difficulty in obtaining reemployment. In addition to this, more than $200,000 a year now expended in California in the purchase of materials, supplies, equipment and contractual services in connection with such operation would be discontinued in the event of a shut down, with consequent loss of business to the community. Furthermore, much of the electrical equipment in said [420] power houses is of such a nature as to deteriorate rapidly if not kept in service, and affiant of his own knowledge knows that the City and County of San Francisco would suffer great monetary loss from such deteri-

oration if such power plant were shut down and required to be kept in an idle condition.

Affiant summarizes the necessary results of compliance with the Court's decree on its effective date, December 28, 1938, as being to cause a deficit in the supply of electric energy required by power consumers in San Francisco, a hazard to the adequacy of the City's water supply, a possible irreparable detriment to its water rights on the Tuolumne River, and an expense to the City of more than $100,000 in construction of capital structures, and more than $50,000 annually in operating expense, which would have to be met from other sources than power revenues which would be lost due to such a shut down.

PAUL J. OST

Subscribed and sworn to before me this 17th day of December, 1938.

[Seal] JAMES F. McCUE,
Notary Public, in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within Affidavit of Paul J. Ost, is hereby admitted this ——— day of December, 1938.

.....

[Endorsed]: Filed Dec. 20, 1938. [421]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern Dis-

trict of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 20th day of December, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: the Honorable Michael J. Roche, District Judge.

[Title of Cause.]

Defendant's application to suspend the injunction heretofore issued herein came on to be further heard. John J. O'Toole and Robert M. Searls, Esqrs., appearing as attorneys for defendant and Frank J. Hennessy, Esq., United States Attorney and William E. Licking, Esq., Assistant United States Attorney, appearing as attorneys for plaintiff. Mr. O'Toole introduced and read the affidavit of Paul J. Ost. After argument by the attorneys for the respective parties, it is ordered that the operation of the injunction heretofore issued herein be and the same is hereby suspended until January 27, 1939. [422]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT

To the Clerk of the above entitled Court:

You are hereby requested to prepare a transcript of record in the said cause, as required by law to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, not later than thirty days from the date hereof,

under the appeal heretofore perfected in said cause, and to include in said transcript the following:

(1) Bill of Complaint for Injunction filed herein April 27, 1937;

(2) Subpoena issued to the defendant upon the filing of the Bill of Complaint with proof of its service;

(3) Amendments to Bill of Complaint for Injunction filed herein June 25, 1937;

(4) Answer of Defendant to Bill of Complaint as amended, filed herein July 20, 1937;

[423]

(5) Opinion of Court Directing Injunction to Issue, filed herein April 11, 1938;

(6) Proposed Findings of Fact and Conclusions of Law, submitted by plaintiff and lodged May 19, 1938;

(7) Defendant's Proposed Amendments to Plaintiff's said proposed Findings of Fact and Conclusions of Law, which were served and lodged by defendant May 31, 1938;

(8) Findings of Fact and Conclusions of Law filed herein June 24, 1938;

(9) Decree filed herein June 28, 1938;

(10) Petition for Rehearing, filed herein July 8th, 1938;

(11) Order Entertaining Petition for Rehearing, made and filed July 8, 1938;

(12) Plaintiff's Answer to Petition for Rehearing, filed herein July 11, 1938;

(13) Order Denying Petition for Rehearing, made July 26, 1938;

(14) Petition for Allowance of Appeal, filed herein October 17, 1938;

(15) Assignment of Errors filed herein October 17, 1938;

(16) Order allowing Time for Filing Statement of Evidence in said cause, filed herein October 17, 1938;

(17) Order allowing appeal, fixing amount of security, and directing issuance of citation.

(18) Bond on Appeal, with aproval of Court thereto, filed herein October 17, 1938;

(19) Citation on Appeal, with proof of service thereof;

(20) Order deferring Consideration of Suspension of Injunction dated October 17, 1938.

(21) Minute order made by the Court respecting the suspension pending appeal of the injunction which by the Decree herein was ordered to be issued.

(22) All minutes of the Court and all orders made in the cause, not specifically mentioned herein;

(23) All certificates made by the Clerk of this Court with reference to the proceedings, rulings and decrees of the Court herein;

(24) The Certificate of the Clerk of this Court to the correctness of the Record on Appeal in this cause; [424]

(25) Stipulation and Order made and filed August 26, 1938, with respect to procedure which should govern appeal;

(26) Notice of Appeal dated October 17, 1938, and filed the same day;

(27) Statement of Evidence filed herein November 7, 1938;

(28) Order dated November 7, 1938, directing transmittal of certain original documents to the Circuit Court of Appeals for Inspection;

(29) All endorsements of filing and acknowledgments and proof of service of pleadings and other documents filed in the cause and mentioned above;

(30) This Praecipe.

Dated: November 7th, 1938.

JOHN J. O'TOOLE
DION R. HOLM
ROBERT M. SEARLS
Attorneys for Defendant and Appellant.

Receipt of a copy of the within Praecipe for Transcript is hereby admitted this ——— day of November, 1938.

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.....

Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Nov. 7, 1938. [425]

[Title of District Court.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of Cali-

fornia, do hereby certify that the foregoing 425 pages, numbered from 1 to 425, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of United States of America vs. The City and County of San Francisco, a municipal corporation, No. 4173-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $80.30, and that the said amount has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of December, A. D. 1938.

[Seal] WALTER B. MALING,
Clerk.

B. E. O'HARA,
Deputy Clerk. [426]

[Title of District Court and Cause.]

CITATION ON APPEAL.

United States of America.—ss.

The President of the United States of America.

To the United States of America, Plaintiff in the above enfitled cause, Greeting:

You are hereby notified that in a certain cause in equity in the Southern Division of the United States District Court for the Northern District of

California, Numbered 4173-R, wherein United States of America is plaintiff, and the City and County of San Francisco (a municipal corporation) is defendant, the above entitled Court, by its order filed and of record in the office of the Clerk thereof, has allowed the defendant in said cause an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit from the decree against said defendant heretofore made and entered [427] in said cause; and

You Are Hereby Cited and Admonished to be and appear at a session of said United States Circuit Court of Appeals for the Ninth Circuit to be held in the City and County of San Francisco, State of California, within thirty (30) days from the date hereof, to show cause, if any there be, why said decree so rendered against said defendant, as mentioned in said order allowing said defendant an appeal therefrom, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Michael J. Roche, United States District Judge for the Northern District of California, this 17th day of October, 1938.

A. F. ST. SURE,
United States District Judge.

Receipt of the foregoing Citation is hereby admitted this 17 day of October, 1938.

FRANK J. HENNESSY,
United States Attorney.
Attorneys for Plaintiff
and Respondent.

[Endorsed]: Filed October 17, 1938. [428]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9055.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,
Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff and Appellee.

STIPULATION.

It Is Hereby Stipulated between the parties in the above entitled appeal that the Clerk of the Court need not print the "Annual Appropriation Ordinance of the City and County for the Fiscal Year 1938-1939," attached to the affidavit of Harold J. Boyd following page 414 of the typewritten record on appeal, but that the parties may refer to and incorporate in any briefs or petitions, which they may respectively file on this appeal, such por-

tions of said Ordinance as they may desire to rely upon and the Court need only examine the portions so printed in such briefs or petitions.

JOHN J. O'TOOLE,
City Attorney.
DION R. HOLM,
Assistant City Attorney.
ROBERT M. SEARLS,
Attorneys for Appellant.
FRANK J. HENNESSY,
United States Attorney.
W. E. LICKING,
Assistant United States Attorney.
Attorneys for Appellee.

It Is So Ordered:

CURTIS D. WILBUR,
Senior United States Circuit Judge.

[Endorsed]: Filed Dec. 28, 1938. Paul P. O'Brien, Clerk.

[Endorsed]: No. 9055. United States Circuit Court of Appeals for the Ninth Circuit. City and County of San Francisco, a municipal corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 27, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9055

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, May 19, 1939.

Before: Wilbur, Denman and Mathews,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered motion of appellant for supersedeas pending appeal submitted to the court for consideration and decision on motion of Mr. Robert M. Searls, counsel for appellant.

Further ordered cause on merits argued by Mr. Robert M. Searls, Mr. John J. O'Toole, City Attorney, City and County of San Francisco, and Mr. Garret W. McEnerney Amicus Curiae, for appellant, and by Mr. Frank J. Hennessy, United States Attorney, and Messrs. William D. Donnelly, and Norman W. Littell, Attorneys, Department of Justice, counsel for appellee, and submbitted to the court for consideration and decision; further briefs 30 x 30 x 20.

(Clerk's Note: Order filed June 9, 1939, superseding decree of District Court of injunction.)

Compared by: MGY-GI

Department of the Interior
Bureau of Reclamation
Washington, D. C.

Office of the Commissioner

CERTIFICATE

Pursuant to the provisions of the Act of Congress approved August 24, 1912 (37 Stat., 497), I hereby certify that the annexed copy of letter dated June 25, 1906, from President Theodore Roosevelt, The White House, Washington, to the Hon. E. A. Hitchcock, Secretary of the Interior, constitutes a full, true, and literal exemplification of copy of said letter contained in the official files in the custody of this office.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Bureau of Reclamation to be affixed, this 30th day of June, A. D. 1939.

[Seal] JOHN C. PAGE
Commissioner,
Bureau of Reclamation.

Copy—EE

Copy

The White House
Washington

June 25, 1906

My dear Mr. Secretary:

As I think it best that there should be a record of our attitude in the Los Angeles Water Supply bill, I am dictating this letter to you in your presence, and that of Senator Flint on behalf of the California Delegation, of Director Walcott of the Geological Survey, and of Chief Forester Pinchot. The question is whether the city of Los Angeles should be prohibited from using the water it will obtain under this bill for irrigation purposes. Your feeling is that it should be so prohibited because the passage of the bill without the prohibition might establish a monopoly in the municipality of Los Angeles as regards irrigation, by permitting the municipality to use the surplus of the water thus acquired, beyond the amount actually used for drinking purposes, for some irrigation scheme.

Senator Flint states that under the proposed law Los Angeles will be seeking to provide its water supply for the next half century, which will mean that at first there will be a large surplus, and that in order to keep their rights they will have to from the beginning draw the full amount of water (otherwise the water will be diverted to other uses and could not be obtained by the city); and while if the city did not need the water it would be proper

that the other users should have it, yet it is a hundred or a thousand fold more important to the State and more valuable to the people as a whole if used by the city than if used by the people of Owens Valley. Senator Flint further says that the same water that is used for drinking and washing is also used on innumerable little plots of land in and around Los Angeles for gardening and similar purposes, and that to prohibit this would so nearly destroy the value of the bill as to make it an open question whether the city either could or would go on with the project; it being open to doubt whether the words "domestic use" would cover irrigation of this kind.

Mr. Walcott and Mr. Pinchot state that there is no objection to permitting Los Angeles to use the water for irrigating purposes so far as there is a surplusage after the city's drinking, washing, fire and other needs have been met. They feel that no monopoly in an offensive sense is created by municipal ownership of the water as obtained under this bill, and that as a matter of fact to attempt to deprive the city of Los Angeles of the right to use the water for irrigation would mean that for many years no use whatever could be made by it of the surplus water beyond that required for drinking and similar purposes.

I am informed by Senator Flint that the law of California provides that if a municipality sells water to people outside the municipality, it must be

at the same rate that it sells it to those within the municipality.

I am also impressed by the fact that the chief opposition to this bill, aside from the opposition of the few settlers in Owen's Valley (whose interest is genuine, but whose interest must unfortunately be disregarded in view of the infinitely greater interest to be served by putting the water in Los Angeles) comes from certain private power companies whose object evidently is for their own pecuniary interest to prevent the municipality from furnishing its own water. The people at the head of these power companies are doubtless respectable citizens, and if there is no law they have the right to seek their own pecuniary advantage in securing the control of this necessary of life for the city. Nevertheless, their opposition seems to me to afford one of the strongest arguments for passing the law, inasmuch as it ought not to be within the power of private individuals to control such a necessary of life as against the municipality itself.

Under the circumstances I decide, in accordance with the recommendations of the Director of the Geological Survey and the Chief of the Forestry Service, that the bill be approved, with the prohibition against the use of the water by the municipality for irrigation struck out. I request, however, that there be put in the bill a prohibition against the City of Los Angeles ever selling or letting to any corporation or individual except the municipality, the right for that corporation or that indi-

vidual itself to sell or sublet the water given to it or him by the city for irrigation purposes.

Sincerely yours,

(Signed) THEODORE ROOSEVELT

HON. E. A. HITCHCOCK,
Secretary of the Interior.

P.S. Having read the above aloud, I now find that everybody agrees to it—you, Mr. Secretary, as well as Senator Flint, Director Walcott, and Mr. Pinchot; and therefore I subscribe to it with a far more satisfied heart than when I started to dictate this letter.

[Endorsed]: Filed July 10, 1909. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, September 13, 1939.

Before: Wilbur and Mathews, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

OPINION

Before: Wilbur, Denman and Mathews, Circuit Judges.

Wilbur, Circuit Judge:

This is an appeal from a decree of the District Court holding that the City and County of San Francisco, hereinafter called the "City", has violated Section 6 of the Raker Act[1] (38 Stat. L. 242), by its disposal of electric energy generated and transmitted through utilization of lands and rights granted to the City by the United States under the terms of that Act, and enjoining such violation. The Court also decreed that if the City should fail to comply with the injunction, "It shall be and hereby is enjoined and restrained from using for development and transmission of electric energy any of the lands, rights and privileges granted to it by plaintiff [the United States] by the Raker Act."

Before dealing with the contentions of the parties we will state the facts relevant to the controversy.

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[1] Section 6 of the Raker Act provides: "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee. * * *"

When the Raker Act was passed (December 19, 1913) San Francisco was a rapidly growing city in an area of comparatively small rainfall, with a small run-off from the neighboring hills which was impounded, distributed and sold to the people of San Francisco by a private corporation, the Spring Valley Water Company, under a "constitutional franchise", by means of water mains and other distributing facilities installed for that purpose. The inadequacy and imperfection of this system was largely responsible for the destruction by fire of a large portion of the City in 1906. The City turned its attention to the water supply of the distant Sierra Nevada mountains where there was a relatively abundant supply of water due to heavy snowfall in the winter. The Tuolumne River rises and flows through the Hetch Hetchy Valley in the mountains. Much of this water had been appropriated by irrigators in the San Joaquin Valley, but a large volume of water in the spring run-off flowed into the sea with little benefit, and considerable damage to riparian owners along the river. The proposed plan was to impound this surplus water in the Hetch Hetchy Valley by a large dam and to pay a part of the huge cost[2] of the impounding and

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[2]The report of the Committee to Congress, contained the following estimate of cost: "The power potentiality of the stream is estimated at 115,000 horsepower in its ultimate development. It is proposed to develop this energy in 10,000 horsepower

transmission of the water for nearly 200 miles by the development and sale of electric energy. The Act required the City to both develop and sell electric energy. (Raker Act, Sec. 9 (l), (m), (n), (o)). The immediate requirement of the City was the acquisition of a dependable water supply which would permit the legitimate growth of the City. The development and sale of electrical energy was a purely incidental matter.

At the time the Raker Act was passed there was not only a distributing system for water already installed in the City by a water company, but also there were two systems for the distribution of electric energy, one owned by the Pacific Gas & Electric Company, hereinafter referred to as "the Company", and the other by the Great Western Power Company. As much of the water of the Tuolumne River was required for irrigation and could be stored by the City for only a limited period, and as the electricity could not be stored, it was evidently within the contemplation of the Raker Act that some means for distributing the water and the electric energy should be provided. Either the systems already existing should be used or new systems to be constructed by the City or by someone authorized to use the streets for such purpose. At that

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units, and use the power for public purposes in San Francisco and adjoining cities. * * *

"The ultimate cost of the project is estimated at $77,000,000. The initial cost for the first installation necessary to bring 200,000,000 gallons of water to the city is $37,500,000."

time, and at present, the City was committed by its charter (Ch. 2, Art. 12, Charter of 1900; Sec. 119, Charter of 1935) to a general policy of public ownership of all public utilities.[3]

Nothing whatever is said in the Raker Act with reference to the acquisition or construction of a distributing system within the City for either water or electric energy, although the Act required the construction of a dam and an electric generating plant. The omission of such provision is significant, not only because of the fact that such a system was obviously necessary, but also because the cost thereof was so great as almost to equal, if not to exceed, all the other costs involved in the undertaking.

The City, under the terms of the Act, has constructed dams and reservoirs for the impounding of water at such elevations above the city that by releasing the water from the reservoirs a large amount of electric power can be developed, as required by the Act. The City has constructed plants at Moccasin Creek and at Early Intake for the generation of power. The power generated from the water stored in Lake Eleanor and impounded by the Lake Eleanor dam was used by the City during the construction of the Hetch Hetchy dam, but is now available for distribution by the City.

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[3] "It is hereby declared to be the purpose and intention of the people of the City and County that its public utilities shall be gradually acquired and ultimately owned by the City and County of San Francisco."

In the original plan submitted to Congress it was contemplated that the water from the Hetch Hetchy reservoir would be pumped over the Coast Range and that a large part of the electric energy developed at the Moccasin plant would be utilized for that purpose. Consequently, at the time the plan was conceived and presented to Congress the disposition of surplus power other than that used by the City for municipal purposes, was a problem of minor importance. A change was made in the plan whereby the City drove a water level tunnel under the Coast Range and thus released a large amount of electric energy developed by the project for distribution and sale by the City. The Company had available to the people of San Francisco a complete distributing system for serving the people of the City with electric energy. The City completed the power line from its power generating plants on the Hetch Hetchy project toward San Francisco only as far as Newark. Although the City had no distributing lines or system and had not completed its transmission lines beyond Newark, it had constructed its power plants and had impounded water sufficient to generate a large amount of electric energy which would be wholly lost if the water, as it passed through the dam and canals of the Hetch Hetchy project, were not utilized for that purpose. In this situation, on July 1, 1925, a contract was entered into between the City and the Company providing for the distribution, through the facilities of the Company, of the electric energy gener-

ated at the Moccasin power plant of the Hetch Hetchy project. In entering into this contract, both parties were fully advised of the terms of the Raker Act and the restrictions contained in Section 6 thereof.

The claim of the United States is that the disposition of electric energy by the contract of July 1, 1925, is a sale of energy to the Company for resale purposes and, consequently, it is a violation of Section 6 of the Raker Act. It is also contended that even if the contract be construed as an agency agreement there is still a violation of the Raker Act by the City since it is claimed there was granted to the Company for a consideration the right as agent to sell the energy.

The City, on the other hand, contends that the contract between it and the Company was an agency contract whereby the Company was employed as agent of the City to distribute the electric energy for it and that such an agency contract does not violate Section 6 of the Raker Act.[1]

The contract, in brief, provides that the City employs the Company as "temporary distributor" for the City of all the electric energy generated at the Moccasin Power House (up to the maximum of 70,000 kilowatts, 3 phase, 60 cycle alternating current of approximately 105,000 volts) at not to exceed a 75 per cent monthly load factor, to distribute

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[1]The City has made other contentions which, in view of the conclusions of this Court, are not necessary to consider.

the same for municipal, industrial and domestic purposes, furnishing all step-down and standby services and metering and collecting from consumers. The charges to consumers are not to exceed lawfully established rates. The electric energy is to be delivered into the system of the Company at Newark and transmitted by the Company to San Francisco. Transmission losses from Newark to San Francisco, amounting to 24 per cent, are to be deducted in estimating the amount of energy delivered. Receipts from the consumers is estimated at 2.383 cents per kilowatt hour (which was the actual average revenue for the year 1924, the year preceding the year that the contract went into effect) and from this sum the Company is to deduct 73.065% as compensation covering its operating expenses and use of capital and to remit the remaining 26.935% to the City. The contract also provides that the return to the City should be proportionately changed in event of increases or decreases in the rates. Under the contract, the Company is bound to make payment for energy the City could have delivered at Newark, under the terms of the contract, regardless of its acceptance and use by the Company.

The intention of the parties as expressed in the contract of July 1, 1925, was to create an agency agreement. It was the deliberate purpose of the parties to avoid making a sale and to avoid a transaction which could be construed as a sale of electric energy by the City to the Company. The contract

was drawn with that purpose and intent. It is conceded that the terminology used in the contract is that appropriate to an agency and not to a sale. In the contract it is stated that "the City hereby employs the Company and the Company accepts employment as temporary distributor for and in behalf of the City, of the electric energy to be generated at Moccasin Power House and transmitted to Newark by the City over its own transmission lines." And the energy is referred to as being "consigned and delivered" at Newark to the Company "for transmission and distribution to consumers" in San Francisco. Although the mere terminology used in a contract will not necessarily determine its character, the court should give effect to the express intent of the parties unless the electric energy is actually sold to the Company. That is, the intent of the parties to create an agency should be given effect unless they have so bargained that the ownership of the electric energy actually vested in the Company under the contract.

We are not dealing with a case where third persons have relied upon the apparent ownership and control of personal property in extending credit or in acquiring an interest in the property. Decisions dealing with such problems are not germane. No such reliance or detriment by the United States is shown because of the existence of the claimed agency agreement in the case at bar.

The United States, in support of its contention that the agreement was one of sale, makes the fol-

lowing contentions in respect to provisions of the contract which, it claims, shows a sales agreement: The Company has exclusive control over the energy once it enters the system of the Company at Newark; deduction of 24 per cent of the energy delivered at Newark does not show that the risk of loss was on the City as would be the case in an agency agreement; the price received by the Cit for electric energy under the contract is in practice fixed without direct relation to the actual revenue received from its sale to consumers; the City is assured of payment and the Company bound to pay for the electric energy specified in the contract without regard to acceptance or use; the rates charged to consumers are not fixed by the City but by the State Railroad Commission; the electric energy is disposed of by the Company to its usual customers in the normal course of its retail trade; the Company is the sole creditor named in the statements rendered to consumers for electric energy originating at Hetch Hetchy; moneys collected by the Company are not segregated with regard to the portion deemed attributable to power produced at Hetch Hetchy; the Company does not account to the City on the sales of electricity to consumers; the City is itself a purchaser from the Company of electric energy, part of which originates at Hetch Hetchy; the contract is terminable by either the City or the Company upon one days notice and subject to cancellation by the parties upon request of the Secretary of the Interior upon his determination that the agreement violates the Raker Act.

Upon analysis, it is clear that these points upon which the United States relies do not show that there is vested in the Company such rights to the electric energy as to constitute a sale of it to the Company regardless of the expressed intention of the parties to create an agency agreement for the transmission of the electric energy.

To say that the Company has exclusive control over the energy once it enters its system at Newark is to overlook the factual situation in regard to the transaction. What loss of control amounts to in this case is merely that the City delivers the electric energy to lines of the Company at Newark. Generation and consumption of the electric energy are simultaneous. The City generates the power and controls the power plant. The ultimate consumer obtains the electric energy by turning his switch, plugging his socket, or pushing a button, etc. Thus, to compare the control of the electric energy by the Company during the time of its transmission (about 1/4650 of a second) with the control of an agent or wholesaler of ordinary merchandise is to overlook what actually takes place in the transmission of the energy. The only control of the Company is that it controls its distribution facilities. But its duty to serve the public is fixed by law. There is nothing in the element of control of the distributing system pointing to a sale. The arrangement made was a practical method of utilizing a public utility corporation as an agent to distribute power generated by the City to its customers in the city.

As to the deduction of 24 per cent of the Hetch Hetchy electric energy as delivered at Newark, we agree with the United States, that it has no bearing one way or the other on the question of passing of title to the energy as it was a deduction computed on average loss. Actually it was not a loss at all in the economic sense. The so-called loss was energy expended in the act of transmission. It was necessarily used for that purpose.

The fact that the price which the City receives is in practice fixed, without reference to all the possible variants in receipts, has no weight as indicating a sale. The formula used in arriving at the price to be received by the City was based on actual receipts of the Company for the sale of electric energy in 1924. The parties to the contract provided for a change of the amount to be received by the City in case of a change in the rates. That neither of the parties have thought it expedient to take advantage of this provision of the contract is beside the point. The method chosen was clearly a reasonable and practical arrangement for compensation of an agent. There is and could be no secret agreement between the parties supplanting or supplementing the contract in question.

One of the points mainly relied upon by the United States as showing a sale is the fact that the City is assured of payment and the obligation of the Company to pay for the electric energy delivered at Newark is unconditional. But in view of the circumstances of this case, where the amount of electric energy supplied did not fill the requirements

of the Company, this provision merely amounts to an agreement by the Company to dispose of the City's electric energy ahead of its own and a guarantee of disposition of all energy supplied under the contract.

The contention of the United States that because the rates prescribed by the contract were not to exceed the lawfully established rates (i.e., those fixed by the Railroad Commission) a sale is shown, is clearly without merit.

The contention is that the contract between the City and the Company does not fix the rates to be charged to the consumer, that the City had power to fix such rates as to electric energy owned and distributed by it and that the fact that the power to fix the rates was conferred upon the Company by the City indicates a sale of electric energy to the Company. In support of this contention it is claimed that the provision in the contract that the rates should not exceed the maximum rates fixed by law, that is, by the Railroad Commission, allowed the Company to charge any rates less than the maximum thus prescribed and therefore permitted the Company to exercise a right of ownership of the electric energy delivered to it by the City. The Company has charged the rates fixed by the Railroad Commission and the conduct of the parties and the eighth covenant of the contract providing for a change of the Company's compensation in the event of a change in rates indicate that it was the intent of the parties that these maximum rates should be charged to the consumers until changed

by competent authority. There is no delegation by the City in the contract to the Company of any power to fix the rates to the consumer and if the City had the power to fix the rates by reason of its ownership it still retains that power unless it be assumed that the contract is one of sale instead of agency, which is the very point in dispute.

The fact that the Company disposes of the energy to its usual customers, that the Company is the sole creditor named in the statements of account, that moneys collected by the Company are not segregated and that the Company makes no accounting of its sales to consumers is of little importance as showing a sale under the circumstances of this case. Here a public utility corporation is one of the contracting parties and a city the other. A practical method was adopted in arriving at its compensation to be paid for transmission and for the use of the Company's facilities. Assuming that the parties could make an agency agreement for distribution of the electric energy it was open to them to contract in any manner they could agree upon. The contention of the government that all the proceeds of the sales by the Company belong to the Company begs the question. There is no provision of the contract to that effect. Nor does the fact that the City paid for Hetch Hetchy electric energy delivered to it by separate account at higher rates after it had been stepped down in voltage and converted in frequency, indicate a sale. This was a practical method of balancing the accounts between the par-

ties and of compensating the Company for services performed in changing the character of the electricity and transmitting it to various points of municipal usage.

The fact that the parties may terminate the contract upon one days notice or upon request of the Secretary of the Interior does not indicate intent of the parties to make a sale.

We conclude that there was no sale made by the City to the Company of the electric energy distributed to the customers in San Francisco and that the contract was one by which the City employed the Company to transmit the City's power to the consumers thereof in the City.

The contention of the United States that the Raker Act forbids the City from contracting with a private company for the distribution of the electric energy by such company as agent for the City is clearly without merit. There is nothing in Section 6 of the Act prohibiting the City from distributing the energy by an agent. It is elementary, of course, that a sale by an agent is the sale of the principal.

We conclude that the City did not violate Section 6 of the Raker Act by making a sale of electric energy to the Company.

At the argument before this court it was pointed out to counsel that Section 6 of the Raker Act does not, by its terms, prohibit the City from making a sale of the water or energy for resale purposes but, rather, prohibits the City from "selling or letting

* * * the right to sell" such water or energy. (See note 1) The United States contended at the hearing and in its opening brief that what was prohibited by Section 6 was a sale for resale purposes. This was not disputed by appellant in its briefs. The court is inclined to the view that Section 6 could not be so construed. It is inclined to believe that a sale of the "right to sell" water or electric energy is distinct from a sale of such water or energy and that Section 6 of the Raker Act only prohibited the sale of the "right to sell" to a corporation or person to whom the water or electric energy had been sold. The right to collect compensation for use of water in California is a franchise. The water itself is not owned or sold, it is the usufruct thereof that is capable of private ownership. (Constitution of California, Art. XIV, §§1, 2.) The right to use the streets to distribute electric energy to inhabitants of a municipality is a franchise and the right to distribute such energy is subject to regulation and permission by the Railroad Commission. (See, Oro Electric Corp. v. R. R. Comm., 169 Cal. 466; 147 P. 118; Section 50, Public Utilities Act, St. Ex. Sess., 1911, p. 43.) As a sale by the City to the Company of electric energy could not invest the Company with the right to sell such energy, the court views it as doubtful whether or not the City has violated the Raker Act even if the contract of July 1, 1925 constituted a sale of electric energy to the Company to be resold by it to the inhabitants of the City.

It must be assumed, of course, that Congress, in enacting the Raker Act, understood the full legal effect of its words, "selling or letting * * * the right to sell". (Montclair v. Ramsdell, 107 U. S. 147.) We called for briefs on the subject.

The City, in its brief submitted after the argument, contends that Section 6 of the Raker Act prohibits a sale of electric energy for resale. It states: "The government and the municipality are agreed that Section 6 prohibits sale for resale."

The United States, in its brief submitted after argument, states: "The thing prohibited is a grant by the City to a private individual or corporation which will carry with it the right, either as owner or agent, to sell water or energy delivered to such individual or corporation by the City."

It concedes, however, that the Act "did not prohibit employment of an agent for transmission purposes".

In view of the position of the City that the Act prohibits a sale for resale, we base our decision upon the sole ground that the contract between the City and the Company was an agency agreement and not a contract of sale.

As to the contention of the United States, reasserted and amplified in its brief after argument, that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City for disposition of the energy on its behalf, it is sufficient to point out that what we have already said disposes of this question. We point out fur-

ther, however, that there are no words contained in Section 6, supra, that are appropriate to prohibit such an arrangement. The United States relies much on the fact that Section 6 prohibits not only "selling" the "right to sell" but also prohibits "letting" that right. But the term "letting" in Section 6 obviously means leasing. This is clear by the use of the word "to" between the word "letting" and the words "any corporation" in the section. (See note 1).

The decree of the District Court is reversed with instructions to dismiss the complaint which does not state a cause of action.

For disqualification subsequent to submission, Judge Denman did not participate in the consideration or decision of this case.

[Endorsed]: Opinion. Filed September 13, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9055

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DECREE

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed with instructions to dismiss the complaint which does not state a cause of action.

[Endorsed]: Filed and entered September 13, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Frank J. Hennessy, U. S. Attorney, counsel for the appellee, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including December 13, 1939; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT
United States Circuit Judge

Dated: San Francisco, California, October 3, 1939.

[Endorsed]: Filed Oct. 3, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six hundred seventy-nine (679) pages, numbered from and including 1 to and including 679, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. Robert H. Jackson, Solicitor General of the United States, of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 13th day of November, A. D. 1939.

[Seal] PAUL P. O'BRIEN,
Clerk.

Supreme Court of the United States

Order allowing certiorari

(Filed January 29, 1940)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.